

Memorandum 2006-41

**Deposition in Out-of-State Litigation
(Draft of Recommendation)**

As part of its broad study of civil discovery, the Commission has been examining the procedure for taking a deposition of a California resident for use in an out-of-state case. Existing law does not provide clear guidance on the proper procedure to follow. In April, the Commission considered comments on a tentative recommendation proposing to clarify this area. Attached for the Commission's consideration is a draft of a final recommendation, which implements the decisions made in April. As the Commissioners may recall, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") is also working in the area, trying to develop a uniform law. A draft that NCCUSL considered at its summer 2006 meeting is attached for the Commission to review (this draft does not reflect decisions made at the summer meeting). To assist the Commission in evaluating NCCUSL's approach, the staff has also prepared and attached draft legislation that attempts to fit the Commission's proposed reforms into NCCUSL's framework.

The first portion of this memorandum discusses issues relating to implementation of the decisions that the Commission made in April. The remainder of the memorandum discusses the status of NCCUSL's study, and compares and contrasts NCCUSL's approach with the Commission's proposal. At the April meeting, the Commission tentatively decided to try to finalize and introduce its proposed legislation in 2007, rather than waiting for NCCUSL to complete its study. The Commission needs to decide the issues discussed in this memorandum and then determine whether to stick with that approach. Because we expect further NCCUSL developments in November, the Commission should wait until at least December to finalize a recommendation. That will give additional time for comment, while still allowing the Commission to meet legislative deadlines if it decides to go forward with 2007 legislation.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

IMPLEMENTATION OF APRIL DECISIONS

The Commission's tentative recommendation was well-received, but the Commission got a number of helpful suggestions to improve the proposal. In April, the Commission directed the staff to make various revisions in response to these suggestions. The staff has implemented the Commission's decisions in the attached draft. We would like to draw attention to the following points.

Drafting Approach

To clarify the procedure for conducting discovery in California for an out-of-state case, the tentative recommendation proposed to add a number of new subdivisions to the existing statute on the subject (Code Civ. Proc. § 2029.010). At the April meeting, the Commission decided to clarify several additional points. The Commission gave the staff discretion regarding whether to cast the proposal as an expansion of the existing statute or to create a number of new sections in the same area of the code.

The attached draft follows the latter approach; it proposes to add several short, new sections immediately after the existing statute. This approach enhances readability and is consistent with drafting principles adopted by the Legislature, Legislative Counsel, and the Commission. See *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789, 793-95 & nn. 8-10 (2003).

Discovery Dispute

Existing law does not make clear how to seek relief when a dispute arises relating to discovery conducted in California for an out-of-state case. Proposed new Code of Civil Procedure Section 2029.060 would clarify the procedure for seeking assistance from a California court:

Code Civ. Proc. § 2029.060 (added). Procedure for resolving discovery dispute

SEC. _____. Section 2029.060 is added to the Code of Civil Procedure, to read:

2029.060. (a) If a dispute arises relating to a deposition that a party is taking in this state for purposes of a proceeding pending in another jurisdiction, the deponent or a party to the proceeding may file a petition for a protective order or to compel discovery or obtain other appropriate relief in the superior court of the county in which the deposition is being taken.

(b) On filing a petition under subdivision (a), a petitioner who is a party to the out-of-state proceeding shall pay a first appearance fee as specified in Section 70611 of the Government Code. A petitioner who is not a party to the out-of-state proceeding shall pay a motion fee as specified in subdivision (a) of Section 70617 of the Government Code.

(c) The court in which the petition is filed shall assign it a case number.

(d) On responding to a petition under this section, a party to the out-of-state proceeding shall pay a first appearance fee as specified in Section 70612 of the Government Code. A person who is not a party to the out-of-state proceeding may file a response without paying a fee.

(e) Any petition, response, or other document filed under this section shall satisfy all of the following conditions:

(1) It shall bear the caption and case number of the out-of-state case to which it relates.

(2) The first page shall state the name of the court in which the document is filed.

(3) The first page shall state the case number assigned by the court under subdivision (c).

A few aspects of this provision warrant discussion.

Proper Tribunal

Subdivision (a) would state that “if a dispute arises relating to a deposition that a party is taking in this state for purposes of a proceeding pending in another jurisdiction, the deponent or a party to the proceeding may file a petition for ... appropriate relief *in the superior court of the county in which the deposition is being taken.*” (Emphasis added.) Subdivision (a) would not expressly address whether a disputant is limited to seeking relief in California, or also has the option of seeking relief in the out-of-state tribunal.

The Comment would attempt to clarify this point:

Comment. Section 2029.060 is added to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction. This section does not preclude a person involved in such a dispute from seeking relief in the out-of-state jurisdiction instead of in California. But other constraints may apply. For example, the out-of-state tribunal might lack personal jurisdiction over the deponent. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

....

Further discussion would appear in the preliminary part (narrative portion) of the proposal:

If a dispute arises regarding discovery conducted in California for a proceeding pending elsewhere, it may be necessary for the deponent or a party to seek relief in court. Sometimes it may be most appropriate to seek relief in the out-of-state tribunal, because that tribunal is familiar with the parties, the facts of the case, and the history of the litigation. On other occasions, it may be more appropriate or even necessary to seek relief in a California court (for example, when the dispute involves a deponent without any ties to the out-of-state forum [FN1], or when a deposition is in progress and it would be easiest for the participants to appear before a local court).

FN 1. If a deponent lacks minimum contacts with an out-of-state forum, it would be unfair and a violation of due process to force the deponent to submit to the jurisdiction of the out-of-state tribunal. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Is this treatment satisfactory, or would the Commission like to handle the matter in another way? It would be possible, for instance, to address the point in the statutory text. The staff did not take that approach because we thought it might prompt requests to spell out precisely when it is or is not appropriate to seek relief in the out-of-state tribunal.

“Petition” Terminology

In the event of a dispute regarding discovery for an out-of-state case, subdivision (a) would authorize a deponent or party to file a “petition” for appropriate relief. The Commission chose this terminology instead of requiring a “motion” because there would not be a pending California case in which to file a “motion.”

Various discovery provisions require a “motion” to be filed in certain circumstances. For example, if a nonparty consumer objects to production of personal records subpoenaed under Code of Civil Procedure Section 1985.3, the subpoenaing party may bring a “motion” to enforce the subpoena. See Code Civ. Proc. § 1985.3(g).

In the context of an out-of-state case, however, the proper procedure would be to file a “petition” to enforce the subpoena. The Comment to proposed Section 2029.060 would explain:

A request for relief pursuant to this section is properly denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

The preliminary part would include a similar explanation (see footnote 38 in the attached draft).

Is this sufficient to clarify the proper terminology? Would it be preferable to say more about this point in the text of proposed Section 2029.060, or in the various provisions that require filing of a “motion”? The staff did not want to clutter the codes with what might be unnecessary language.

Filing Fees

The Commission’s proposal seeks to clarify the proper filing fee for a petition or other document relating to a dispute over discovery for an out-of-state case. In the tentative recommendation, the Commission proposed to vary the amount charged depending on the nature of the out-of-state case. For example, if the out-of-state case were comparable to a limited civil case, the fee for filing a petition would be the same as the first appearance fee for a plaintiff in a limited civil case; if the out-of-state case were comparable to an unlimited civil case, the fee for filing a petition would be the same as the first appearance fee for a plaintiff in an unlimited civil case.

The Administrative Office of the Courts (“AOC”) suggested charging a flat fee instead. The AOC pointed out that there might be disputes over whether an out-of-state case were comparable to a particular type of California proceeding, and it would be difficult for a court clerk to make such determinations. See First Supplement to CLRC Memorandum 2006-7, pp. 2-4 & Exhibit pp. 1-2.

At the April meeting, the Commission decided in concept to adopt a flat fee approach. The Commission directed the staff to work out the details with the AOC. CLRC Minutes (April 2006), p. 10.

In the attached draft, the fee for filing a petition relating to discovery for an out-of-state case would be \$320, the same as the first appearance fee for a plaintiff in an unlimited civil case. See proposed Section 2029.060(b); Gov’t Code § 70611. Similarly, the fee for responding to such a petition would be \$320, the

same as the first appearance fee for a defendant in an unlimited civil case. See proposed Section 2029.060(d); Gov't Code § 70612.

A special rule would apply to a nonparty deponent. If a nonparty files a petition relating to discovery for an out-of-state case, the filing fee would be \$40, the same as the fee for filing a motion in a California case. See proposed Section 2029.060(b); Gov't Code § 70617(a). If a nonparty responds to such a petition, there would be no fee for filing the response. See proposed Section 2029.060(d).

The staff chose this approach for the following reasons:

- (1) Although the matter consists of a discovery dispute rather than an entire case, it may require more effort for the court to resolve than many cases that are filed. Frequently, the only action in a California case will be the filing of pleadings and perhaps taking of some discovery, followed by settlement. Nonetheless, each party must pay a first appearance fee, even though the case consumes few judicial resources. Resolving a dispute regarding discovery for an out-of-state case may actually be more burdensome on a California court than a typical California case, justifying a substantial filing fee for participants in the out-of-state case. As with a California case, a first appearance fee would only be charged once. If there were more than one discovery dispute in the same county relating to the same out-of-state case, a party who already paid a first appearance fee would not have to pay such a fee again. See proposed Code Civ. Proc. § 2029.070 in the attached draft.
- (2) A dispute relating to discovery for an out-of-state case might involve difficult choice-of-law issues or other complications arising because the discovery in question is being conducted for an out-of-state case, not a California case. Due to the potential difficulty of the issues, it makes sense to treat such a dispute as equivalent to an unlimited civil case.
- (3) Under the Commission's proposal, the procedure for reviewing the superior court's decision in the dispute would be to seek a writ from the appropriate court of appeal. See proposed Section 2029.100 in the attached draft; see also CLRC Minutes (April 2006), p. 14. If review is in the court of appeal rather than the appellate division of the superior court, the matter is being treated similar to an unlimited civil case and thus should be subject to the first appearance fee for an unlimited civil case.
- (4) In a California case, a nonparty deponent does not have to pay a first appearance fee in the event of a discovery dispute. First appearance fees apply only to a party or intervenor; they usually are paid in connection with an initial pleading, before a discovery dispute arises. See, e.g., Gov't Code §§ 70611, 70612. If a nonparty deponent is the moving party in a discovery dispute, the nonparty

deponent must only pay a motion fee. If a nonparty deponent merely responds to a discovery motion, there is no filing fee for the response. A nonparty Californian should receive similar treatment when being deposed for purposes of an out-of-state case.

The staff has been in communication with the AOC about the filing fees, but we do not know whether the AOC and Judicial Council will agree with the proposed approach. We expect further input. The Commission should **consider whether the proposed approach is reasonable or could be improved in some way.**

Subsequent Discovery Dispute in Same Case and County

In the attached draft, a separate provision would address what happens if there is a subsequent discovery dispute in the same county relating to the same out-of-state case:

Code Civ. Proc. § 2029.070 (added). Subsequent discovery dispute in same case and county

SEC. _____. Section 2029.070 is added to the Code of Civil Procedure, to read:

2029.070. (a) If a petition has been filed under Section 2029.060 and another dispute later arises relating to a deposition being taken in the same county for purposes of the same out-of-state proceeding, the deponent or a party to the proceeding may file a petition for appropriate relief in the same superior court as the first petition.

(b) The first page of the petition shall clearly indicate that it is not the first petition filed in that court that relates to the out-of-state case.

(c) If the petitioner in the new dispute is not a party to the out-of-state case, or is a party who previously paid a first appearance fee under this chapter, the petitioner shall pay a motion fee as specified in subdivision (a) of Section 70617 of the Government Code. If the petitioner in the new dispute is a party to the out-of-state case but has not previously paid a first appearance fee under this chapter, the petitioner shall pay a first appearance fee as specified in Section 70611 of the Government Code.

(d) If a person responding to the new petition is not a party to the out-of-state case, or is a party who previously paid a first appearance fee under this chapter, that person does not have to pay a fee for responding. If a person responding to the new petition is a party to the out-of-state case but has not previously paid a first appearance fee under this chapter, that person shall pay a first appearance fee as specified in Section 70612 of the Government Code.

(e) Any petition, response, or other document filed under this section shall satisfy all of the following conditions:

(1) It shall bear the caption and case number of the out-of-state case to which it relates.

(2) The first page shall state the name of the court in which the document is filed.

(3) The first page shall state the same case number that the court assigned to the first petition relating to the out-of-state case.

Comment. Section 2029.070 is added to clarify the procedure that applies when two or more discovery disputes relating to the same out-of-state proceeding arise in the same county. To promote efficiency and fairness and minimize inconsistent results, all documents relating to the same out-of-state case are to be filed together, bearing the same California case number.

....

This provision attempts to ensure that (1) the filing fee is adjusted to account for prior payment of a first appearance fee, and (2) all documents relating to the same out-of-state case are filed together, so that the court is aware of its previous actions and can efficiently render fair and consistent decisions. The Commission should **consider whether the provision achieves these objectives.**

Subsequent Discovery Dispute in Another County

Proposed Section 2029.070 would only apply if there were a subsequent discovery dispute in the same county relating to the same out-of-state case. If a subsequent discovery dispute arose in a different California county, the disputants would have to seek relief in the superior court of that county, not the county in which the first dispute arose. See proposed Section 2029.060(a). This approach is necessary to avoid forcing a California witness to appear in a court far away from where the witness resides. As the Commission discussed in April, however, it might be possible to transfer one of the disputes under some circumstances.

The attached draft discusses that possibility in the Comment to Section 2029.070:

Section 2029.070 does not apply when discovery disputes relate to the same out-of-state case but arise in different counties. In that situation, each petition for relief must be filed in the superior court of the county in which the deposition is being taken. See Section 2029.060(a). In appropriate circumstances, a petition may be transferred and consolidated with a petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation); see also Gov't Code § 70618 (transfer fees). In determining whether to order

a transfer, a court should consider factors such as convenience of the deponent and similarity of issues.

A similar discussion appears in the preliminary part, under the heading “Subsequent Discovery Dispute in Another County.”

These discussions refer to Government Code Section 70618, which specifies the fee for transferring a case:

70618. When the venue in a case is changed, the fee for making up and transmitting the transcript and papers is fifty dollars (\$50) and a further sum equal to the uniform fee for filing in the court to which the case is transferred. The clerk shall transmit the uniform filing fee with the papers in the case to the clerk or judge of the court to which the case is transferred.

There would not be a special fee provision for this type of transfer.

Is this appropriate or is further clarification needed? We encourage comment, particularly from the AOC, on whether a special fee provision is needed. The situation may be so rare that one is not warranted.

Review of Superior Court Decision in Discovery Dispute

At the April meeting, the Commission discussed the procedure for obtaining review of a superior court decision regarding a dispute over discovery for an out-of-state case. The Commission decided that the proper procedure should be to seek a writ from a court of appeal. Minutes (April 2006), p. 14.

Proposed Section 2029.100 would implement that decision:

Code Civ. Proc. § 2029.100 (added). Writ petition

SEC. _____. Section 2029.100 is added to the Code of Civil Procedure, to read:

2029.100. (a) If a superior court issues an order granting or denying or otherwise resolving a petition under Section 2029.060 or 2029.070, a party or deponent aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ.

(b) Immediately after filing a writ petition in a court of appeal under this section, the petitioner shall file a copy of it in the superior court that issued the challenged order.

(c) Pending its decision on the writ petition, the court of appeal may stay the order of the superior court, the deposition that is the subject of that order, or both.

(d) Immediately after the court of appeal decides the writ petition and its order on the petition becomes final, the clerk of the court of appeal shall file a copy of the final order with the clerk of the superior court.

Comment. Section 2029.100 is added to clarify the procedure for reviewing a decision of a superior court on a dispute arising in connection with discovery under this chapter. The provision is modeled on Sections 400 (writ of mandate to review order on motion to change place of trial) and 403.080 (writ of mandate to review order on reclassification motion).

The provisions on which Section 2029.100 is modeled set a 20-day deadline for filing a writ, which a court can extend for an additional ten days on a showing of good cause. See Code Civ. Proc. §§ 400, 403.080. The staff has not included such a deadline in proposed Section 2029.100. Due to the discretionary nature of a writ proceeding, strong incentives to file promptly already exist. A rigid deadline may be unnecessary; many types of writs have no deadline and are simply subject to the doctrine of laches. California Civil Writ Practice §1.16, pp. 23-24 (CEB 2006). **Does the Commission want to include a deadline?**

NCCUSL STUDY

At the April meeting, the Commission opted to continue with its study of interstate depositions rather than table the study pending completion of NCCUSL's similar study. But the Commission directed the staff to "continue to monitor NCCUSL's study and communicate with persons involved in that study, so that the Commission has the benefit of the NCCUSL's work and vice versa." Minutes (April 2006), p. 8. The remainder of this memorandum provides an update on NCCUSL's study, describes NCCUSL's proposal, and presents possible means of meshing that proposal with the Commission's own proposal.

Status

After several drafting committee meetings in 2005 and 2006, a draft *Interstate Depositions and Discovery of Documents Act* was presented to NCCUSL for initial consideration at its annual meeting last July. The draft considered at that meeting is attached for the Commission to review (several changes were made just before the draft was presented to NCCUSL; we have cut and pasted to show the draft as it was actually presented). Commissioners should take a good look at NCCUSL's draft to become familiar with its substance.

Reaction to the draft was generally favorable. Most of the discussion centered on whether to accelerate NCCUSL's normal study process and whether to require that a subpoena under the act be accompanied by a list of all parties and the names, addresses, and telephone numbers of all counsel of record. NCCUSL

decided to stick with its normal study process and tinkered with the draft in various respects. A draft incorporating those changes is not yet publicly available.

The NCCUSL drafting committee is scheduled to meet again on November 10, 2006, in Philadelphia. The committee chair (Richard Long of New York) anticipates that this will be the last drafting committee meeting before the act is presented to NCCUSL for final approval at its annual meeting in Pasadena next summer. After the drafting committee meeting, the act will be reviewed by NCCUSL's style committee for compliance with NCCUSL's stylistic conventions. Mr. Long is reasonably confident that NCCUSL will approve the act next summer; there has been no significant opposition to date.

Overview of Substantive Approach

The goals of NCCUSL's interstate deposition study are similar to the goals that the Commission has been trying to achieve. As stated in the draft presented to NCCUSL last summer, "[a] uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents."

Given this overlap in goals, it is perhaps unsurprising that the procedure NCCUSL is considering is much like the procedure proposed by the Commission, although less detailed. The key sections of the attached NCCUSL draft are Sections 2-6. The remaining sections are less substantive: Section 1 is the title of the act, Section 7 says the act should be construed to promote uniformity of the law, and Section 8 states the effective date. The title of the act and each of the key sections is discussed below.

NCCUSL Section 1. Interstate Depositions and Discovery Act

The NCCUSL drafting committee first proposed that the uniform act be called the "Interstate Depositions and Discovery of Documents Act." To reflect that the act is also intended to cover inspection of premises and discovery of tangible items other than documents, the title has since been changed to the "Interstate Depositions and Discovery Act."

In California, the term "deposition" is broadly applied, encompassing all of the following:

- (1) A pretrial proceeding in which a witness orally testifies (Code Civ. Proc. §§ 2020.310, 2025.010-2025.620).

- (2) A pretrial proceeding in which a witness answers written questions under oath (Code Civ. Proc. §§ 2028.010-2028.080).
- (3) A pretrial proceeding in which a witness testifies and produces documents or other tangible things (Code Civ. Proc. §§ 2020.510, 2025.010-2025.620).
- (4) A pretrial proceeding in which a nonparty witness is only required to produce business records for copying (Code Civ. Proc. §§ 2020.410-2020.440; Evid. Code §§ 1560-1567).

The draft recommendation uses the terms “deponent” and “deposition” accordingly.

The Commission previously considered whether to use different terminology to refer to the situation in which a nonparty witness is compelled to produce a document or other item for inspection, without having to testify. See CLRC Memorandum 2006-7, pp. 27-28. The Commission decided to continue using the terms “deponent” and “deposition” for purposes of this study, because the terminology problem should be examined more globally, not addressed solely in this specific context. CLRC Minutes (April 2006), p. 10. To assist readers who may be unfamiliar with California usage, the staff included a footnote in the draft recommendation explaining how the term “deposition” is used in California (see footnote 3 in the attached draft). **Is this a satisfactory means of handling the matter, or would the Commission like to include further explanation?**

Issues relating to inspection of premises are discussed in connection with NCCUSL’s proposed Section 3, under “Inspection of Premises” below.

NCCUSL Section 2. Definitions

Section 2 of the NCCUSL draft defines certain terms:

SECTION 2. DEFINITIONS. In this [act]:

(1) “Foreign jurisdiction” means the District of Columbia, Puerto Rico, the United States Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States, or any of the United States other than this state.

(2) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(3) “Subpoena” means a court order regardless of title requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

Comment. This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term “Subpoena” includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

A number of points are noteworthy.

Scope

NCCUSL’s proposed definition of “foreign jurisdiction” only includes United States jurisdictions. As the Comment explains, the uniform act would not apply to discovery for litigation pending in another nation.

In contrast, Code of Civil Procedure Section 2029.010 expressly includes a discovery request “issued out of any court of record in ... a foreign nation....” The Commission is not proposing to change this aspect of the statute.

Clearly, there sometimes will be requests to take discovery from a Californian for use in litigation in another nation, such as Canada or Mexico. There should be some guidance on how a California court is to handle such a request.

NCCUSL’s proposed Comment suggests the possibility of preparing a separate act on discovery for litigation in another nation. According to the chair of the drafting committee, however, there are no immediate plans for preparation of such an act. He said that if the act currently under consideration is approved and appears to work well, NCCUSL might extend it to discovery for litigation in another nation. He did not have specific advice on how a state should handle such discovery in the interim.

The staff lacks expertise in international law and would appreciate input from those who have such expertise. **Are the procedural clarifications being proposed by the Commission problematic as applied to discovery for litigation in another nation?** Of key concern is protecting California citizens from potential harm or harassment, while maintaining good relations with other nations. Our

hunch is that the proposed procedure generally will work fine and if a foreign nation is potentially abusive, federal or international law would override any state statute that might be invoked for an improper purpose. **It would be helpful to receive comments on whether this perception is correct.**

Type of Document From Out-of-State Tribunal

The NCCUSL draft defines “subpoena” to include “a court order regardless of title” that requires a person to submit to discovery. In contrast, Code of Civil Procedure Section 2029.010 applies when a “mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation”

Often, it might be simpler and less expensive for an out-of-state litigant to obtain a traditional subpoena from the out-of-state forum than to obtain a “mandate, writ, letters rogatory, letter of request, or commission.” Is it necessary to insist on presentation of a “mandate, writ, letters rogatory, letter of request, or commission”?

The Commission should **consider whether to adopt NCCUSL’s less rigid approach on this point.** In the attached draft recommendation, that could be accomplished by replacing the proposed amendment of Section 2029.010 with the following:

Code Civ. Proc. § 2029.010 (amended). Deposition in action pending outside California

SEC. _____. Section 2029.010 of the Code of Civil Procedure is amended to read:

2029.010. Whenever any mandate, writ, letters rogatory, letter of request, ~~or commission, subpoena, or other document, however~~ denominated, commanding a person to appear and testify, or to produce documents and things, is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition, or a deposition for the production of documents and things, of a ~~natural~~ person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony or producing documents and things in actions pending in California.

Comment. Section 2029.010 is amended to encompass any document, however denominated, that is issued by a court of record of another jurisdiction and commands a person to appear and testify, or to produce documents and things, for purposes of a

proceeding pending in that jurisdiction. In the spirit of comity, this amendment is designed to make it simpler, easier, and less expensive for an out-of-state litigant to depose a witness located in California, while still protecting the witness from oppressive or abusive discovery.

The section is also amended to apply to an organization located in California, not just an individual found in the state. See Section 17 (“the word ‘person’ includes a corporation as well as a natural person”); see also *Hassan v. Mercy American River Hospital*, 31 Cal. 4th 709, 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623 (2003) (whether “person” as used in particular section of Code of Civil Procedure includes corporation or non-corporate entity “is ultimately a question of legislative intent”); *Oil Workers Int’l Union v. Superior Court*, 103 Cal. App. 2d 512, 570-71, 230 P.2d 71 (1951) (unincorporated association is “person” for purpose of statutes in Code of Civil Procedure governing contempt).

The section is further amended to make clear that it includes a deposition for the production of documents and things, even if the deponent is not required to testify.

Inspection of Premises

The NCCUSL draft would expressly apply to a request for inspection of premises, as well as a request for testimony or a request for production of documents and other tangible things. The Commission’s proposal is less clear in this respect; it refers to “a deposition for the production of documents and things,” which could but need not necessarily be interpreted to include inspection of premises.

In the attached draft recommendation, **that ambiguity could be eliminated by replacing the proposed amendment of Section 2029.010 with the following:**

Code Civ. Proc. § 2029.010 (amended). Deposition in action pending outside California

SEC. _____. Section 2029.010 of the Code of Civil Procedure is amended to read:

2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition, or a deposition for the inspection and production of documents, tangible things, land, or other property, of a ~~natural~~ person in California, the deponent may be compelled to appear and testify, and to produce ~~documents and things~~ documents, tangible things, land, or other property for inspection, in the same manner, and by the same process as may be employed for the purpose of taking testimony or producing

documents, tangible things, land, or other property for inspection in actions pending in California.

Comment. Section 2029.010 is amended to apply to an organization located in California, not just an individual found in the state. See Section 17 (“the word ‘person’ includes a corporation as well as a natural person”); see also *Hassan v. Mercy American River Hospital*, 31 Cal. 4th 709, 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623 (2003) (whether “person” as used in particular section of Code of Civil Procedure includes corporation or non-corporate entity “is ultimately a question of legislative intent”); *Oil Workers Int’l Union v. Superior Court*, 103 Cal. App. 2d 512, 570-71, 230 P.2d 71 (1951) (unincorporated association is “person” for purpose of statutes in Code of Civil Procedure governing contempt).

The section is also amended to make clear that it encompasses (1) a deposition for the production of documents or other items, even if the deponent is not required to testify, and (2) a deposition involving inspection of land or other property.

This amendment could easily be adjusted if the Commission decides not only to make this clarification regarding inspection of premises, but also to extend the statute to “any document, however denominated,” as discussed in the previous section.

NCCUSL Section 3. Issuing a Subpoena

Section 3 of the NCCUSL draft describes the procedure for obtaining a subpoena from a local court for discovery in an out-of-state case:

SECTION 3. ISSUING A SUBPOENA.

(a) A party may present a subpoena issued from a court of record of a foreign jurisdiction to the clerk of court in the [county or district] in which discovery is sought to be conducted in this state.

(b) When a party presents a subpoena issued from a court of record of a foreign jurisdiction to the clerk of court in this state, the clerk shall immediately issue a subpoena to the person to whom the subpoena is directed and incorporate the terms used in the foreign jurisdiction subpoena.

There appears to be an inadvertent error in subdivision (b); the clerk should issue the subpoena to the person who requested it, not to “the person to whom the subpoena is directed.”

The proposed procedure for obtaining a subpoena is much like the procedure in the Commission’s proposal. Importantly, the procedure is designed to be simple and expeditious. It would suffice to present the appropriate

documentation to the clerk of court; it would not be necessary to appear before a judge or retain local counsel just to get a subpoena.

A few differences between the proposals merit discussion.

Filing of an Application

Unlike the Commission's proposal, NCCUSL Section 3 does not require the filing of an application to obtain a subpoena. It would be sufficient to present a subpoena issued by an out-of-state jurisdiction to the clerk of a California court, who would then issue a California subpoena with identical terms. NCCUSL's proposed Comment explains the process this way:

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas where the witness to be deposed lives in Ohio: A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Ohio county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare an Ohio subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Ohio, who will take the completed and executed Kansas subpoena and the completed but not yet executed Ohio subpoena to the clerk's office in Ohio. The clerk of court, upon being given the Kansas subpoena, will then issue the identical Ohio subpoena ("issue" includes signing, stamping, and assigning a docket number). The process server will pay any necessary filing fees, and then serve the Ohio subpoena (with a list of all parties and counsel of record) on the deponent in accordance with Ohio law.

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

Should the Commission's proposal be redrafted to eliminate the need for an application? The staff does not think so. Under proposed Section 2029.050, the application form would have to require the applicant to attach a true and correct copy of the document from the out-of-state tribunal authorizing the discovery. Other than this constraint, the content of the application form would be left to the Judicial Council to develop. We envision a simple form that would help to prevent confusion, ensure that court clerks receive all necessary information and fees, and draw attention to applicable requirements for taking the requested discovery in California. For example, the form could just:

- Include a space at the top for indicating the caption and case number of the out-of-state case.
- Include another space for indicating the name of the court in which the application is filed.
- State that the applicant is requesting issuance of a subpoena pursuant to Code of Civil Procedure Sections 2029.020-2029.030.
- Require the applicant to attach the document from the out-of-state tribunal requesting discovery.
- Require the applicant to declare under penalty of perjury that the attached document is a true and correct copy of what it purports to be.
- Require the applicant to attach a California subpoena that is ready for the court to issue with identical terms as the out-of-state document.
- Perhaps also alert the applicant to requirements such as the necessary filing fee, California rules governing service of process, and applicable witness fees.

We think a form like this would help court clerks, process servers, and litigants understand and clearly articulate what the court is being asked to do and what requirements must be met for that request to be granted. **Does the Commission agree?** An application form should not be required if preparing and submitting the form would be unnecessarily burdensome.

Type of Out-of-State Proceeding Covered

Section 3(b) of the NCCUSL draft says that “[w]hen a party presents a subpoena issued from a court of record of a foreign jurisdiction to the clerk of court in this state, the clerk shall immediately issue a subpoena” (Emphasis added.) The proposed Comment explains that “[t]he term ‘Court of Record’ was chosen to exclude non-court of record proceedings from the ambit of the Act.” The

NCCUSL drafting committee “felt that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act.”

In the staff’s opinion, the proposed statutory text does not clearly articulate the principle expressed in the Comment — i.e., that the statutory procedure applies only when discovery is sought for an out-of-state lawsuit, not when discovery is sought for an out-of state arbitration or other type of proceeding. Rather, the proposed text just says that there must be a “subpoena issued from a court of record of a foreign jurisdiction.” Does the subpoena have to request discovery *for a lawsuit pending in a court of record* in the foreign jurisdiction, or could the subpoena request discovery *for an arbitration, administrative adjudication, small claims case, or other such proceeding* pending in the foreign jurisdiction? The proposed text does not clearly address this point; only the Comment makes the intent clear.

This drafting ambiguity exists not only in Section 3 of the NCCUSL draft, but also in Code of Civil Procedure Section 2029.010, which applies “[w]henever any mandate, writ, letters rogatory, letter of request, or commission is *issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation*, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California (Emphasis added.) The Commission should **consider whether to try to eliminate the ambiguity**.

Ideally, it should be clear whether Section 2029.010 would apply if an out-of-state court issued a mandate or other document requesting discovery from a Californian for use in an out-of-state arbitration, administrative adjudication, or the like. Realistically, this may not be so easy to accomplish; there might be differences of opinion on what types of proceeding should or should not be covered. NCCUSL’s Comment recognizes as much when it points out that including an out-of-state arbitration “might generate resistance to the Act.” The staff is concerned that expressly excluding an out-of-state arbitration, administrative adjudication, small claims case, or other such proceeding might also generate resistance. Certainly that approach could be criticized for failing to provide a means for out-of-state disputants to obtain necessary discovery for such proceedings.

At this point, the staff is uncertain what is the best way for the Commission to handle this matter. **We encourage input from interested persons and will attempt to obtain further information on the subject.**

Other Details Relating to Issuance of a Subpoena for an Out-of-State Case

Unlike the Commission's proposal, NCCUSL's draft would not:

- Expressly permit a California attorney to issue a California subpoena for an out-of-state case in which the attorney has been retained as local counsel.
- Require the Judicial Council to prepare or modify a subpoena form for use in out-of-state litigation.
- Specify that the subpoena must include the caption and case number of the out-of-state case, as well as the name of the court that issues it.

The Commission's proposal is more detailed than NCCUSL's draft in these respects. The Commission addressed these details for specific reasons, as explained in the draft recommendation. **Is the staff correct in assuming that the Commission wants to retain these aspects of its proposal?**

NCCUSL Section 4. Serving a Subpoena

Section 4 of the NCCUSL draft provides:

SECTION 4. SERVING A SUBPOENA. A party seeking to serve a subpoena issued by a clerk of court under Section 3 must serve the subpoena in compliance with [cite rule or statute of this state for service of subpoena]. The subpoena must be accompanied by a list of all parties and the names, addresses, and telephone numbers of all counsel of record.

The NCCUSL drafting committee is still debating over whether to include the second sentence, which would require that the subpoena be accompanied by a list of all parties and the names, addresses, and telephone numbers of all counsel of record. It seems best to defer discussion of that matter until NCCUSL's position is more clear.

The first sentence of Section 4 would specify what law governs the manner of serving a subpoena that is issued for an out-of-state case. The applicable law would be the law of the state in which the discovery is conducted, not the law of the state in which the case is pending.

For example, if Section 4 were adopted in California, the first sentence could be phrased as follows: "A party seeking to serve a subpoena issued by a clerk of court under Section 3 must serve the subpoena in compliance with Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure." Alternatively, the first sentence could be phrased as: "A party

seeking to serve a subpoena issued by a clerk of court under Section 3 must serve the subpoena *in compliance with the law of this state, including, without limitation, Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.*” (Emphasis added.) The latter approach seems preferable because it would encompass requirements that are expressed in case law, as well as statutes that are not located with the bulk of the provisions governing service of process.

As a substantive matter, there does not seem to be any significant difference between Section 4 and existing California law on what law governs service of a subpoena that is issued for an out-of-state case. Like Section 4, Code of Civil Procedure Section 2029.010 makes clear that California law applies:

2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and *by the same process as may be employed for the purpose of taking testimony in actions pending in California.*

(Emphasis added.) With respect to service of process, both provisions reflect the same policy choice and provide the same level of protection for a California resident. **There is no policy issue that the Commission needs to resolve.**

NCCUSL Section 5. Deposition, Production, and Inspection

Section 5 of the NCCUSL draft would specify what law governs how to conduct an oral deposition, production of documents or other tangible things, or inspection of premises for an out-of-state case. Again, the applicable law would be the law of the state in which the discovery is conducted, not the law of the state in which the case is pending. Section 5 provides:

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION.

If a subpoena issued under Section 3 commands the person to:

- (1) attend and give testimony at a deposition, the time and place for and the manner of taking the deposition must comply with [cite rule or statute of this state governing the time and place for and the manner of taking depositions];
- (2) produce designated books, documents, or tangible objects, the production must comply with [cite rule or statute of this state

governing the production of designated books, documents, and tangible objects]; or

(3) permit inspection of premises, the inspection must comply with [cite rule or statute of this state governing the inspection of premises].

Comment. The Act requires that a deposition, production of records, and inspection of premises must comply with the laws of the discovery state. Since the discovery state's primary interest in these cases is to protect its residents who become non-party witnesses in an action pending in another jurisdiction from any unreasonable or unduly burdensome discovery request, this is easily accomplished by requiring that the discovery procedure be the same as it would be if the case had originally been filed in the discovery state.

Again, there does not seem to be any significant substantive difference between Section 5 and existing California law on the same subject. Code of Civil Procedure Section 2029.010 says that "the deponent may be compelled *to appear and testify, and to produce documents and things, in the same manner, and by the same process* as may be employed for the purpose of taking testimony in actions pending in California." (Emphasis added.) As with Section 4, **there does not seem to be any policy issue that the Commission needs to resolve.**

NCCUSL Section 6. Motions

Section 6 of the NCCUSL draft is a different story. It states:

SECTION 6. MOTIONS. Any motion to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the laws of this state and be presented in the court in the [county or district] in which discovery is to be conducted.

Comment. The act requires that any motion to enforce, quash, or modify a subpoena, or any motion to compel testimony, must comply with the procedural and evidentiary law of the discovery state. Again, the discovery state's primary goal is to protect its residents who become non-party witnesses in an action pending in another jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state.

The committee chose not to address particular evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege. As the preface notes, such issues are particularly thorny, and are best decided under the laws of the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

The staff has a number of comments about this provision.

Terminology and Level of Detail

NCCUSL Section 6 uses different terminology than the Commission's proposal and includes much less detail regarding the procedure for resolving a dispute relating to discovery for an out-of-state case. Section 6 would require a "motion," while the Commission's proposal would require a "petition." The Commission's proposal would address details such as filing fees, captions and case numbers, the hearing date and briefing schedule, the procedure for seeking appellate review, handling of a subsequent discovery dispute in the same case and county, and application of the rules to a deposition taken on notice or agreement. See proposed Sections 2029.060-2029.100 in the draft recommendation.

These distinctions between the two proposals are not surprising. Because of the wide variation between court systems across the country, it would be difficult to prepare a uniform act addressing details such as the ones in the Commission's proposal, or using procedural terminology that is acceptable everywhere.

The terminology difference ("motion" versus "petition") is of minor importance, and most of the procedural detail is not inconsistent with what NCCUSL is proposing, only further clarification of the process for resolving a discovery dispute. But there are some significant substantive distinctions to consider.

Types of Discovery Disputes Covered

NCCUSL Section 6 would apply to "[a]ny motion to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3" In contrast, proposed Section 2029.060 in the draft recommendation would apply "if a dispute arises relating to a deposition that a party is taking in this state for purposes of a proceeding pending in another jurisdiction"

The staff is concerned about whether the language in NCCUSL Section 6 is broad enough to cover all of the different types of discovery disputes that might arise. **On this point, we prefer the language in the Commission's proposal, which is more clearly intended to cover all different types of discovery disputes.**

Forum for Resolving a Discovery Dispute

NCCUSL Section 6 says that “[a]ny motion to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 *must ... be presented in the court in the [county or district] in which discovery is to be conducted.*” (Emphasis added.) Along the same lines, proposed Section 2029.060 would say that “[i]f a dispute arises relating to a deposition that a party is taking in this state for purposes of a proceeding pending in another jurisdiction, the deponent or a party to the proceeding *may* file a petition for ... appropriate relief *in the superior court of the county in which the deposition is being taken.*”

With regard to identifying the proper forum within California to resolve a dispute, the provisions reach the same result. Under both provisions, the dispute is to be resolved in the county in which the discovery is conducted.

However, the NCCUSL provision is phrased such that it appears to preclude resolution of the dispute in the out-of-state tribunal. In contrast, proposed Section 2029.060 does not say the dispute “must” be resolved in California, only that it “may” be resolved in California. And the Comment would explain:

This section does not preclude a person involved in such a dispute from seeking relief in the out-of-state jurisdiction instead of in California. But other constraints may apply. For example, the out-of-state tribunal might lack personal jurisdiction over the deponent. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The Commission’s approach on this point seems preferable. In fact, NCCUSL decided at its summer meeting to clarify that Section 6 would not preclude resolution of a dispute in the out-of-state tribunal. We do not yet have NCCUSL’s new language on this point. The Commission **should stick with its approach.**

Law Governing Resolution of a Discovery Dispute

NCCUSL Section 6 would state that “[a]ny motion to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 *must comply with the laws of this state*” (Emphasis added.) The staff finds this aspect of the provision troubling, especially if a discovery dispute could be resolved in the out-of-state tribunal, not just in California.

In such a situation, would the disputants have to follow California rules regarding the format of papers or the hearing date and briefing schedule for resolving their discovery dispute? What about other California procedural

requirements, such as a meet and confer requirement or restrictions on the availability of discovery sanctions?

We think the area is murky and articulating precisely when California law should and should not apply is not easy. We therefore prefer the vagueness of Section 2029.010, which says only:

Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, *the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.*

(Emphasis added.) The Commission should consider **whether to stick with this vague approach, or address the matter more directly, as in NCCUSL's draft.**

Use of NCCUSL's Statutory Language and Organizational Scheme

There are obvious potential advantages to having a widely-adopted uniform law on interstate depositions. It would facilitate discovery across the nation, enabling litigants to follow the same procedure for obtaining a subpoena wherever they conduct discovery.

In substance, the Commission's proposal has much in common with NCCUSL's approach. Both procedures are designed to be simple and efficient, while still protecting the interests of the person from whom discovery is sought.

A major difference between the two proposals is the level of detail. This would not preclude adoption of NCCUSL's provisions; they could simply be supplemented with additional provisions proposed by the Commission.

There are some important substantive differences between the proposals, as discussed above. The Commission should **resolve the various issues, and then assess how close its proposal is to what NCCUSL is considering.**

It may be possible to adopt much of NCCUSL's proposed language and fit the Commission's proposed reforms within NCCUSL's organizational scheme. The chair of the NCCUSL drafting committee strongly encourages the Commission to consider that approach.

To assist the Commission in evaluating that possibility, the staff has prepared draft legislation that attempts to fit the Commission's proposed reforms into NCCUSL's framework. In some instances, we have followed NCCUSL's

approach to an issue; elsewhere we have used the Commission's approach. To facilitate review of this draft legislation, NCCUSL's language is shown in gray. The Commission should **review the attached draft legislation combining the NCCUSL and Commission proposals, and decide whether this drafting approach is worth pursuing.**

In making that determination, the Commission should bear in mind that NCCUSL will not vote on whether to approve a uniform act until mid-summer 2007. Revisions might be requested at the summer meeting and the NCCUSL style committee might make changes after the act is approved. Based on his experience as an associate member of the National Conference, the Executive Secretary anticipates that NCCUSL's final language will not be available until approximately this time next year.

Thus, if the Commission decides to try to track the uniform act, it probably would be best to wait until 2008 to introduce legislation. The alternative would be to seek enactment of legislation in 2007, but expect to prepare a clean-up bill after NCCUSL completes its study. That approach probably would be less efficient than introducing a single bill.

The answer as to how to proceed may become more clear after the NCCUSL drafting committee holds its final meeting in November. In the meantime, the Commission should decide as many of the remaining issues as it can, and continue to gather pertinent information. **We encourage interested persons to comment on any aspect of this study that appears to need attention.** Further input, particularly on the new issues raised in this memorandum, may be invaluable in ensuring that the final product of this study effectively serves the citizens of California.

Respectfully submitted,

Barbara Gaal
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

<h2>STAFF DRAFT</h2>

RECOMMENDATION

Deposition in Out-of-State Litigation

[Date To Be Determined]

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF RECOMMENDATION

The Law Revision Commission proposes to clarify and refine the procedure for obtaining discovery from a witness in this state for purposes of a proceeding pending in another jurisdiction.

The proposed legislation would specify the procedure and filing fee for obtaining a subpoena to take such discovery. To conserve judicial resources, prevent confusion, and minimize litigation expenses, the procedure would be simple and expeditious. Upon filing an application and paying a filing fee, an out-of-state litigant could obtain a subpoena from the clerk of the superior court for the county in which the discovery is to be conducted. It would not be necessary to appear before a judge or, in most circumstances, to retain local counsel. To further streamline the process, the proposed legislation would direct the Judicial Council to prepare subpoena and application forms for mandatory use in this situation.

The proposed legislation would also clarify the procedure for resolving a dispute relating to discovery for an out-of-state proceeding. To resolve such a dispute in a California court, a litigant or deponent would need to file a petition in the superior court for the county in which the discovery is being conducted. The proposed legislation would specify the proper filing fee, hearing date and briefing schedule, and other procedural details.

By providing guidance on these points and related matters, the proposed legislation would help to prevent disputes and inconsistent treatment of litigants. The recommended reforms would not only benefit litigants in out-of-state proceedings, but would also assist California court personnel, process servers, witnesses, and others affected by discovery conducted for out-of-state litigation.

This recommendation was prepared pursuant to Resolution Chapter 1 of the Statutes of 2006.

DEPOSITION IN OUT-OF-STATE LITIGATION

1 The Law Revision Commission is engaged in a study of civil discovery and has
2 issued several recommendations on that topic.¹ In this recommendation, the
3 Commission proposes to revise the law to provide clear guidance on the procedure
4 that litigants, courts, and witnesses are to follow when discovery is taken in
5 California for purposes of an out-of-state proceeding.

6 Existing Law

7 Code of Civil Procedure Section 2029.010² governs the procedure for deposing³
8 a witness in California for purposes of a proceeding pending in another
9 jurisdiction. The provision applies when an out-of-state court issues a mandate,⁴
10 writ,⁵ letters rogatory,⁶ letter of request,⁷ or commission⁸ requesting that a person
11 in California testify or produce materials for use in an out-of-state case. It states:

12 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or
13 commission is issued out of any court of record in any other state, territory, or

1. *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm'n Reports 161 (2004); *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004); *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

Any California Law Revision Commission document referred to in this recommendation can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

2. 2004 Cal. Stat. ch. 182, § 23. Section 2029.010 continues former Code of Civil Procedure Section 2029 without change. Section 2029.010 Comment.

3. Under California law, the term "deposition" is used to refer to: (1) a pretrial proceeding in which a witness orally testifies (Code Civ. Proc. §§ 2020.310, 2025.010-2025.620), (2) a pretrial proceeding in which a witness answers written questions under oath (Code Civ. Proc. §§ 2028.010-2028.080), (3) a pretrial proceeding in which a witness testifies and produces documents or other tangible things (Code Civ. Proc. §§ 2020.510, 2025.010-2025.620), and (4) a pretrial proceeding in which a witness is only required to produce business records for copying (Code Civ. Proc. §§ 2020.410-2020.440; Evid. Code §§ 1560-1567).

4. A "mandate" is a "judicial command." Cochran's Law Lexicon (5th ed. 1973).

5. A "writ" is a "court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act." Black's Law Dictionary (8th ed. 2004).

6. The term "letters rogatory" is synonymous with "letter of request." It refers to a "document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case." Black's Law Dictionary 916 (8th ed. 2004).

7. For what constitutes a "letter of request," see *supra* note 6.

8. A "commission" is a "warrant or authority, from the government or a court, that empowers the person named to execute official acts." Black's Law Dictionary (8th ed. 2004).

district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.

Under this provision, a California court can use its subpoena power to compel a witness in the state to submit to a deposition for purposes of a proceeding pending elsewhere.⁹ Because an out-of-state tribunal may be unable to compel discovery from a non-party witness located in California, the provision can be critical in ascertaining the truth and achieving justice in an out-of-state proceeding.¹⁰ The assistance that the provision extends to other jurisdictions may in turn prompt such jurisdictions to reciprocate with respect to cases pending in California.¹¹

Inadequacies of Existing Law

Section 2029.010 does not specify the details of the procedure for issuing a subpoena to take a deposition in California for purposes of an out-of-state proceeding. It is not clear from the statutory text what type of paper the deposing party must submit to the court, whether that party must pay a filing fee and, if so, what fee applies, whether a hearing before a judge is required, whether an attorney may issue a subpoena instead of the court, what format to use for the subpoena, and whether it is necessary to retain local counsel.¹² Because the provision applies

9. State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986, *Reporter's Note to Section 2029*, at 59 (Jan. 1986) (hereafter, "State Bar-Judicial Council Report").

10. Mullin, Jr., *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev. 1, 2 (1981).

11. State Bar-Judicial Council Report, *supra* note 9, at 59. Section 2029.010 is similar to the Uniform Foreign Depositions Act ("UFDA"), which was approved in 1920 by the American Bar Association and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Quite a number of states have adopted the UFDA or a variant of it. See, e.g., Fla. Stat. Ann. § 92.251; Ga. Code Ann. § 24-10-110 to 24-10-112; Md. Code Ann., Cts. & Jud. Proc. §§ 9-401 to 9-403; Nev. Rev. Stat. §§ 53.050-53.070; N.Y. C.P.L.R. 3102(e); Ohio Rev. Code Ann. § 2319.09; Ore. R. Civ. Proc. 38(C); S.D. Codified Laws § 19-5-4; Tenn. Code Ann. § 24-9-103; Va. Code Ann. § 8.01-411 to 8.01-412.1; Wyo. Stat. Ann. § 1-12-115; see also La. Rev. Stat. Ann. § 13:3821-13:3822, 13:3824; Mo. Stat. Ann. § 492.270; Mo. R. Civ. Proc. 57.08; Neb. R. Civ. Disc. 28(e); N.D. R. Civ. Proc. 45(a)(3); N.H. Rev. Stat. Ann. §§ 517:18, 517-A:1; S.C. R. Civ. Proc. 28(d); Tex. Civ. Prac. & Rem. Code Ann. § 20.002; Utah R. Civ. Proc. 26(h).

Other states have not adopted the UFDA but also extend comity with regard to an in-state deposition for purposes of an out-of-state proceeding. See *infra* note 11.

12. Like Section 2029.010, the UFDA does not specify the details of the procedure for issuing a subpoena to take a deposition in a state for purposes of a proceeding pending in another state. In contrast, Section 3.02 of the Uniform Interstate and International Procedure Act ("UIIPA") is more specific in some respects.

The UIIPA was approved by NCCUSL in 1962 and was intended to supersede the UFDA. It has only been adopted or essentially adopted in a few jurisdictions. See Ind. R. Trial Proc. 28(E); Mass. Gen. Laws ch. 223A, § 11; Mich. Comp. Laws § 600.1852; 42 Pa. Cons. Stat. § 5326; see also La. Rev. Stat. Ann. §§ 13:3821-13:3822, 13:3824 (adopting UIIPA Section 3.02, but also retaining version of UFDA). NCCUSL

1 to a “natural person,” it is also questionable whether an organization located in
2 California can be deposed for an out-of-state proceeding. The statute covers a
3 deposition in which the witness is required to produce documents as well as
4 testify, but is ambiguous as to whether it covers a deposition solely for the
5 production of documents. Further, the statute does not make clear how to seek
6 relief when a dispute arises in a deposition taken in California for purposes of an
7 out-of-state proceeding. The proper enforcement procedure is particularly
8 uncertain when a deposition is taken on notice or agreement without issuance of a
9 California subpoena.

10 Because the statute fails to provide guidance on these points, California courts
11 vary widely in how they handle such matters.¹³ This inconsistent and unpredictable
12 treatment is unfair.

13 To ensure even-handedness and prevent confusion, the Law Revision
14 Commission proposes to amend the provision to give additional guidance as
15 detailed below. The recommended reforms to clarify the process will not only
16 benefit litigants in out-of-state proceedings, but will also assist California court
17 personnel, process servers, witnesses, and others affected by application of the
18 provision.

19 **Proposed Reforms**

20 The Commission proposes reforms to clarify (1) the types of deponent covered
21 by Section 2029.010, (2) the types of discovery to which the provision applies, (3)
22 the procedure and filing fee for issuing a subpoena under the statute, (4) the use of
23 local counsel, and (5) the procedure for resolving a dispute arising in connection
24 with discovery under the statute.

withdrew the UIIPA in 1977. See NCCUSL, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its 105th Year, Table IV, at 578 (1996). For this reason, and because it was not widely adopted, Section 3.02 of the UIIPA is of limited value as a model for nationwide uniformity.

Many states have provisions that do not track either the UFDA or UIIPA Section 3.02. There is great variety among these. See Ala. R. Civ. Proc. 28(c); Alaska R. Civ. Proc. 27(c); Ariz. R. Civ. Proc. 30(h); Ark. R. Civ. Proc. 28(c); Conn. Gen. Stat. § 52-155; Conn. R. Superior Ct. Civ. Proc. § 13-28; Del. Code Ann. tit. 10, § 4311; Haw. Rev. Stat. § 624-27; Idaho R. Civ. Proc. 28(e); Ill. Supreme Ct. R. 204(b); Iowa Code § 622.84; Kan. Stat. Ann. § 60-228(d); Ky. R. Civ. Proc. 28.03; Me. R. Civ. Proc. 30(h); Minn. R. Civ. Proc. 45.04; Miss. R. Civ. Proc. 45(a)(2); Mont. R. Civ. Proc. 28(d); N.J. R. Civ. Prac. 4:11-4; N.M. Stat. Ann. § 38-8-1; N.C. R. Civ. Proc. 28(d); Okla. Stat. Ann. tit. 12, § 2004.1(A)(2); R.I. Gen. Laws § 9-18-11; Vt. Stat. Ann. tit. 12, § 1248; Wash. Superior Ct. Civ. R. 45(d)(4); W. Va. R. Civ. Proc. 28(d); Wisc. Stat. § 887.24; see also Bushnell, *How To Take an Out-of-State Deposition*, 14 Utah Bar J. 28, 28 (2001) (explaining that “each state has its own peculiar requirements”); Mullin, Jr., *supra* note 10, at 52 (noting “the numerous varieties of interstate deposition statutes, their inconsistencies, and their ambiguities”). There does not seem to be any uniformity in how other states handle the points that require clarification here in California.

13. Email from Tony Klein to Barbara Gaal (July 6, 2005) (CLRC Staff Memorandum 2005-26, Exhibit pp. 1-3); R. Best, C.C.P. Revisions: California Subpoena for Foreign State Action (2004) (CLRC Staff Memorandum 2005-26, Exhibit pp. 4-6).

1 ***Type of Deponent***

2 By its terms, Section 2029.010 is limited to “the oral or written deposition of a
3 natural person in California” This limitation was deliberately imposed in the
4 Civil Discovery Act of 1986.¹⁴ The drafters’ apparent concern was that some
5 jurisdictions might not permit a deposition of an organization (as opposed to a
6 natural person) and litigants might try to subvert such a restriction by seeking to
7 depose an organization in California instead of the forum state.¹⁵

8 California appears to be unusual and perhaps unique in its approach to this point.
9 The Commission is not aware of any statute comparable to Section 2029.010 that
10 expressly applies only to a deposition of a natural person.

11 As a matter of policy, deposing an organization located in California may be just
12 as important to the pursuit of truth as deposing an individual who resides in the
13 state. Consistent with the spirit of comity inherent in Section 2029.010, the
14 Commission recommends revising the statute to apply to the oral or written
15 deposition of any person in California.¹⁶

16 ***Type of Discovery Sought***

17 From the statutory language, it is clear that Section 2029.010 encompasses not
18 only a deposition requiring testimony alone, but also one requiring both testimony
19 and the production of tangible evidence. It is ambiguous, however, whether the
20 language encompasses a deposition in which no testimony is required, only the
21 production of documents or other tangible evidence.¹⁷

22 The provision should be revised to eliminate this ambiguity. Its terms and
23 protections should apply regardless of whether a witness producing tangible
24 evidence is compelled to testify in addition.¹⁸

25 ***Issuance of a Subpoena By a California Court***

26 By its terms, Section 2029.010 does not apply unless (1) a court of another
27 jurisdiction has issued a mandate, writ, letters rogatory, letter of request, or
28 commission, or (2) the deposition of a natural person in California is required by
29 notice or agreement. Presumably, a litigant cannot obtain a subpoena under the
30 statute without presenting evidence that one of these requirements is satisfied.
31 Aside from this restriction, it is not clear what a litigant must do to obtain a
32 subpoena from a California court.

33 The requirements reportedly differ from court to court and sometimes even from
34 clerk to clerk.¹⁹ In some instances, a clerk will issue a subpoena on presentation of

14. State Bar-Judicial Council Report, *supra* note 9, at 59.

15. See *id.*

16. See proposed amendment to Section 2029.010 *infra*.

17. For key provisions governing such a deposition, see Code Civ. Proc. §§ 2020.010(a)(3), 2020.410-2020.440.

18. See proposed amendment to Section 2029.010 *infra*.

1 the original or a copy of one of the documents listed in the statute. Other times, a
2 court may require greater formality, such as the filing of a formal petition or civil
3 case cover sheet, or attendance at a hearing before a judge or other judicial
4 officer.²⁰

5 The Commission recommends that the procedure be clear, simple, and uniform
6 from county to county. It does not seem necessary to subject litigants to the
7 expense of a court hearing, or to consume the attention of a judicial officer, just
8 for issuance of a subpoena. If a discovery dispute arises, then a judge or other
9 judicial officer may need to be involved. To obtain a subpoena under the proposed
10 law, however, it would be sufficient to file a properly completed application with
11 the court clerk and the clerk would issue the subpoena. The proper court for filing
12 the application would be the superior court of the county in which the deposition is
13 to be taken.²¹

14 The Commission further recommends that the statute direct the Judicial Council
15 to prepare an application form for use in this situation.²² A litigant would be
16 required to use the Judicial Council form once that form becomes available. This
17 would streamline the process for litigants, court clerks, process servers, attorneys,
18 and other affected parties. The proposed law would specify that the application
19 form require the applicant to attach a true and correct copy of the document
20 authorizing the deposition in the out-of-state proceeding.²³ Aside from this
21 restriction, the content of the form would be left to the Judicial Council to develop,
22 perhaps drawing on requirements stated in some of the more detailed statutes from
23 other states.²⁴ The intent is to prevent confusion, ensure that court clerks receive
24 all necessary information, and draw attention to applicable requirements for taking
25 the requested discovery in California.

26 To further streamline the process, the proposed law would also direct the
27 Judicial Council to prepare one or more subpoena forms that include clear
28 instructions for use in issuance of a subpoena for discovery in an out-of-state

19. See sources cited in note 12 *supra*.

20. Like Section 2029.010, many of the comparable statutes of other states are silent regarding the proper procedural approach. The statutes that do address such details vary in the degree of formality they require. In some states, a judge must issue the subpoena, not the court clerk. See, e.g., Mich. R. Civ. Proc. 2.305(E); Ala. R. Civ. Proc. 28(c); Ky. R. Civ. Proc. 28.03; N.C. R. Civ. Proc. 28(d); Wash. Superior Ct. Civ. R. 45(d)(4). Other states use a less complicated approach. See, e.g., Ariz. R. Civ. Proc. 30(h); Mont. R. Civ. Proc. 28(d); Miss. R. Civ. Proc. 45(a)(2); N.D. R. Civ. Proc. 45(a)(3); Utah R. Civ. Proc. 26(h).

21. See proposed Sections 2029.020 and 2029.030 *infra*.

22. See proposed Section 2029.050(a) *infra*.

23. See proposed Section 2029.050(a) *infra*. A true and correct copy of the required document should be sufficient. It would not be appropriate for the application form to require the original or a certified copy, because the original might not be accessible to the litigant requesting the subpoena nor in the custody of a court or other entity that could provide a certified copy.

24. See, e.g., Ariz. R. Civ. Proc. 30(h); Me. R. Civ. Proc. 30(h).

1 proceeding.²⁵ The Judicial Council would have the option of either creating new
2 forms or modifying existing forms to meet this requirement. Again, use of the
3 appropriate form would be mandatory once it becomes available.²⁶ To ensure that
4 the deponent has key information to seek protection if needed, the subpoena would
5 have to bear the caption and case number of the out-of-state case to which it
6 relates, as well as the name of the superior court that authorized the discovery and
7 has jurisdiction in the event of a problem.

8 ***Filing Fee for Issuance of a Subpoena***

9 There is great disparity in the fees California courts charge for issuance of a
10 subpoena to take a deposition in the state for purposes of an out-of-state
11 proceeding. Some courts charge a first appearance fee and at least one court
12 charges multiple first appearance fees if a litigant seeks more than one subpoena.
13 Other courts require more modest fees.²⁷

14 The Uniform Civil Fees and Standard Fee Schedule Act of 2005²⁸ does not
15 expressly address what fee to charge in this situation. The Commission proposes
16 to amend the law to specify a relatively modest fee of \$20 per subpoena,²⁹
17 comparable to the fee for issuing a commission to take an out-of-state deposition.³⁰

18 ***Retention of Local Counsel***

19 Section 2029.010 does not say whether it is necessary for a party to retain local
20 counsel to be able to depose a witness in California for a proceeding pending in
21 another jurisdiction. But there is other guidance on that point.

22 By statute, a person may not practice law in California unless the person is an
23 active member of the State Bar.³¹ A recently adopted rule of court makes clear,
24 however, that under specified conditions it is permissible for an attorney duly

25. See proposed Section 2029.050(b) *infra*.

26. In many respects, the existing subpoena forms are already suitable for use when a person seeks to depose a California witness for purposes of an out-of-state proceeding. But portions of those forms are not. For instance, it is unclear what caption and case number to include, and some of the statutory references in some of the forms are plainly inapplicable to a deposition for purposes of an out-of-state proceeding (e.g., the form Deposition Subpoena for Personal Appearance includes a box for indicating that “This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).”) Although the necessary adjustments may be minor, it would be beneficial to have the Judicial Council review the subpoena forms with out-of-state litigation in mind.

27. Email from Tony Klein to Barbara Gaal (July 6, 2005) (CLRC Staff Memorandum 2005-26, Exhibit pp. 1-3); see also Email from Tony Klein to Barbara Gaal (April 25, 2006) (Second Supplement to CLRC Staff Memorandum 2006-7, Exhibit p. 3); Email from Kristen Tsangaris to Barbara Gaal (Dec. 28, 2005) (CLRC Staff Memorandum 2006-7, Exhibit p. 9).

28. 2005 Cal. Stat. ch. 75.

29. See proposed amendment to Gov’t Code § 70626 *infra*.

30. *Id.*

31. Bus. & Prof. Code § 6125.

1 licensed to practice in another state to perform litigation tasks in California on a
2 temporary basis for a proceeding pending in another jurisdiction.³²

3 The drafters of this rule specifically considered the situation in which an out-of-
4 state attorney deposes a witness in California for purposes of an out-of-state
5 proceeding.³³ Thus, if a party is represented by an out-of-state attorney in an out-
6 of-state proceeding under the conditions specified in the rule, the party does not
7 have to retain local counsel to be able to depose a witness in California. Further, if
8 a party is self-represented in an out-of-state proceeding, the party does not have to
9 retain local counsel to be able to depose a witness in California.³⁴ Local counsel
10 may be needed, however, if a discovery dispute arises in a deposition under
11 Section 2029.010 and it is necessary to appear in a California court to resolve the
12 dispute.

13 Because these matters are already governed by other law, there is no need to
14 address them in proposed statutory revisions. To assist persons involved in
15 discovery for an out-of-state case, however, a Comment to one of the proposed
16 new provisions would refer to the relevant authorities.³⁵

17 *Issuance of a Subpoena By Counsel*

18 For an action pending in California, an attorney of record may issue a subpoena
19 instead of having to obtain a subpoena from the court.³⁶ Section 2029.010 does not
20 specify, however, whether an attorney may issue a subpoena to depose a witness
21 in California for a proceeding pending in another jurisdiction.

22 The Commission proposes to amend the statute to make clear that an active
23 member of the California Bar retained to represent a party in an out-of-state
24 proceeding may issue a deposition subpoena pursuant to the statute for purposes of
25 that proceeding. The proposed law would not extend that privilege to an out-of-
26 state attorney. It seems reasonable to require the involvement of either a California

32. Cal. R. Ct. 966. An attorney who temporarily practices law in California pursuant to this rule thereby submits to the jurisdiction of the State Bar and the state courts to the same extent as a member of the State Bar. The attorney is also subject to the laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar, and the California Rules of Court. *Id.*

For a case holding that Business and Professions Code Section 6125 did not apply to legal services provided in California by out-of-state counsel to a non-California resident, see *Estate of Condon*, 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922 (1998).

33. California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations, at 24 (Jan. 7, 2002).

34. See *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[A]lthough persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California.”).

35. See proposed Section 2029.040 Comment *infra*.

36. Section 1985(c).

1 court or a California attorney to issue process under the authority of the State of
2 California.³⁷

3 *Discovery Dispute*

4 If a dispute arises regarding discovery conducted in California for a proceeding
5 pending elsewhere, it may be necessary for the deponent or a party to seek relief in
6 court. Sometimes it may be most appropriate to seek relief in the out-of-state
7 tribunal, because that tribunal is familiar with the parties, the facts of the case, and
8 the history of the litigation. On other occasions, it may be more appropriate or
9 even necessary to seek relief in a California court (for example, when the dispute
10 involves a deponent without any ties to the out-of-state forum,³⁸ or when a
11 deposition is in progress and it would be easiest for the participants to appear
12 before a local court). Section 2029.010 does not provide guidance on the proper
13 procedure to follow in such circumstances.

14 The proposed law would eliminate this ambiguity. It would require the person
15 desiring relief to file a petition in the superior court of the county in which the
16 deposition is being taken.³⁹ The petitioner would have to pay a first appearance
17 fee,⁴⁰ as would each person who responds to the petition.⁴¹ The amount of these
18 first appearance fees would be \$320, the same as the corresponding first
19 appearance fees for an unlimited civil case pending in a California court.⁴² This fee

37. Contrary to the proposed approach, Iowa seems to permit an out-of-state attorney to issue a subpoena under Iowa authority that is directed to a witness within the state. See Iowa Code Ann. § 622.84(1). That appears to be an unusual position.

38. If a deponent lacks minimum contacts with an out-of-state forum, it would be unfair and a violation of due process to force the deponent to submit to the jurisdiction of the out-of-state tribunal. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

39. See proposed Section 2029.060 *infra*. A request for relief pursuant to this section would be denominated a “petition,” not a “motion,” because there would not be a pending California case in which to file a “motion.”

For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Code of Civil Procedure Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

40. See proposed Section 2029.060(b) *infra*.

41. See proposed Section 2029.060(d) *infra*.

42. See Section 2029.060(b),(d) *infra*; Gov’t Code §§ 70611, 70612.

The Commission considered the possibility of varying the amount charged depending on the nature of the out-of-state case. For example, if the out-of-state case were comparable to a limited civil case, the fee would be the same as the first appearance fee for a limited civil case; if the out-of-state case were comparable to an unlimited civil case, the fee would be the same as the first appearance fee for an unlimited civil case. The Commission rejected this approach because there might be disputes over whether an out-of-state case is comparable to a particular type of California proceeding and because it would be difficult for a court clerk to make such determinations.

1 amount is appropriate because resolving the dispute might involve difficult choice-
2 of-law issues or other complications arising because the discovery in question is
3 being conducted for an out-of-state case, not a California case. Additionally,
4 although the matter consists of a discovery dispute rather than an entire case, it
5 may require more effort for the court to resolve than many cases that are filed in
6 California.⁴³

7 A special rule would apply to a person who is not a party to the out-of-state
8 case. If such a person were the petitioner, the fee for filing the petition would be
9 \$40, the same as for a discovery motion in a California case.⁴⁴ If such a person
10 were responding to a petition, there would be no fee for filing the response.⁴⁵ This
11 would parallel the treatment of a nonparty in a California case.⁴⁶

12 To ensure that all documents relating to the same out-of-state case are filed
13 together (including the subpoena application, subpoena, and documents relating to
14 any subsequent discovery dispute), the petition and any response to it would have
15 to bear the caption and case number of the out-of-state case.⁴⁷ To ensure that all
16 persons involved in a dispute know which California court is handling the dispute,
17 the first page of the petition or any response would also have to include the name
18 of the court in which the document is filed.⁴⁸ In addition, the proposed law would
19 require the superior court to assign a California case number.⁴⁹

20 Further, the proposed law would clarify the briefing schedule and notice
21 requirements that apply to a petition for relief pertaining to discovery in an out-of-
22 state case. Those matters would be governed by Code of Civil Procedure Section
23 1005, the same as for a discovery motion in a case pending within the state.⁵⁰

24 *Subsequent Discovery Dispute in Same Case and County*

25 On occasion, more than one discovery dispute relating to a particular out-of-
26 state case might arise in the same county. In some instances, both disputes might
27 involve the same disputants in the same roles (petitioner or respondent). Other
28 times, there might be little or no overlap between the first dispute and a

43. Frequently, the only action in a California case will be the filing of pleadings and perhaps taking of some discovery, followed by settlement. Nonetheless, each party must pay a first appearance fee, even though the case consumes few judicial resources. Resolving a dispute regarding discovery for an out-of-state case may actually be more burdensome on a California court than a typical California case.

44. See proposed Section 2029.060(b), (d).

45. *Id.*

46. Only a party or an intervenor must pay a first appearance fee in a California case. See, e.g., Gov't Code §§ 70611, 70612.

47. See proposed Section 2029.060(e) *infra*.

48. *Id.*

49. *Id.*

50. See proposed Section 2029.080 *infra*.

1 subsequent dispute: the disputants might be different⁵¹ or their roles might be
2 reversed.⁵²

3 Regardless of which situation occurs, the superior court should be aware of all
4 previous actions it has taken with regard to the out-of-state case. This is necessary
5 to promote efficiency and fairness and to minimize inconsistent results.

6 By requiring use of the out-of-state caption and case number on all documents
7 relating to an out-of-state case, the proposed legislation would facilitate that
8 objective.⁵³ To further ensure that all documents relating to the same out-of-state
9 case are filed together, the first page of any subsequent petition would have to
10 include the same California case number that the court assigned to the first petition
11 filed in connection with the out-of-state case.⁵⁴

12 The proposed legislation would also make clear what filing fee applies when
13 multiple discovery disputes relating to the same out-of-state case arise in the same
14 county. If a disputant is a party to the out-of-state case and has not previously paid
15 a first appearance fee, the disputant would have to pay such a fee.⁵⁵ But if a
16 disputant is not a party to the out-of-state case, or has previously paid a first
17 appearance fee, the disputant would only have to pay \$40 for filing a petition and
18 would not have to pay anything for filing a response.⁵⁶ To assist in determination
19 of the appropriate fees, the first page of a subsequent petition would have to
20 clearly indicate that it is not the first petition filed in the county pertaining to the
21 out-of-state case.⁵⁷

22 *Subsequent Discovery Dispute in Another County*

23 At times, two or more discovery disputes relating to the same out-of-state case
24 might arise in different counties. In that situation, the proposed legislation would
25 require that each petition for relief be filed in the superior court of the county in
26 which the discovery in question is being conducted.⁵⁸ This approach is necessary

51. For example, the first dispute might be between the plaintiff in an out-of-state case and a California deponent who refuses to produce a particular document; the second dispute might be between a defendant in the out-of-state case and a different deponent.

52. For example, a deponent might seek a protective order with regard to a particular document requested by the plaintiff in the out-of-state case; later, the plaintiff might move to compel the same deponent to answer a particular question at the deposition.

53. See proposed Sections 2029.030(b)(1), 2029.040(b)(1), 2029.060(e)(1), 2029.070(e)(1) *infra*. If the caption on a petition were based on the names and roles of the disputants instead, documents relating to the same out-of-state case might be placed in different files, causing confusion or other adverse consequences.

54. See proposed Section 2029.070(e)(3) *infra*.

55. See proposed Section 2029.070(c), (d) *infra*.

56. See proposed Section 2029.070(c), (d) *infra*.

57. See proposed Section 2029.070(b) *infra*.

58. See proposed Section 2029.060(a) *infra*.

1 to avoid forcing a California witness to appear in a court far away from where the
2 witness resides.

3 In appropriate circumstances, a petition could be transferred and consolidated
4 with a petition pending in another county.⁵⁹ In determining whether to order a
5 transfer, a court should consider factors such as convenience of the deponent and
6 similarity of issues.

7 ***Deposition on Notice or Agreement***

8 Section 2029.010 expressly applies “whenever, on notice or agreement, it is
9 required to take the oral or written deposition of a natural person in California”
10 If a deposition is required on notice or agreement, the deposing party may see no
11 need to subpoena the witness under the statute because the witness is already
12 obligated to attend the deposition. The statute does not make clear, however,
13 whether issuance of a California subpoena is a prerequisite to invoking the
14 enforcement power of a California court in the event of a discovery dispute.

15 Often, if a dispute arises regarding a deposition pursuant to notice or agreement
16 that is taken in California for an out-of-state case, the disputants will be able to
17 seek relief in the out-of-state forum.⁶⁰ In some instances, however, it may be
18 preferable for a deponent or party to the out-of-state case to seek relief in a
19 California court. In particular, the proximity of a California court to the place of
20 deposition may be a significant factor.⁶¹

21 When this occurs, it should be possible for the deponent or party to resort to the
22 California court regardless of whether the deposition is being taken pursuant to a
23 California subpoena. The opposite approach — requiring a California subpoena to

59. See Code Civ. Proc. §§ 403 (transfer), 1048(a) (consolidation); see also Gov’t Code § 70618 (transfer fees).

60. A witness who can be deposed on notice generally will be a party deponent and thus will be subject to the jurisdiction of the out-of-state tribunal.

61. The importance of providing a convenient forum for resolution of any discovery dispute helps to explain why Section 2029.010 encompasses a deposition on notice or agreement. The UFDA and many statutes modeled on the UFDA also encompass a deposition on notice or agreement. See sources cited in note 11 *supra*.

It is a burden on the California court system to have to resolve a dispute relating to a deposition in California for purposes of an out-of-state proceeding. But Section 2029.010 reflects a policy decision that other factors outweigh that burden. In particular, the following considerations may justify the policy decision underlying the statute:

(1) As compared to the out-of-state tribunal, a California court may be more protective of policy interests that are considered important in California.

(2) By providing assistance to litigants and counsel in out-of-state proceedings, Section 2029.010 helps to promote availability of similar assistance for Californians when they take, or have their attorneys take, depositions outside California.

(3) The burden on the California court system due to this type of dispute is not likely to be substantial. In general, a party to an out-of-state proceeding probably will seek relief in that proceeding rather than in a California court, because the out-of-state tribunal is likely to be familiar with the case while the California court is not.

1 enforce discovery rights and obligations relating to a deposition on notice or
2 agreement taken in California for an out-of-state case — would entail needless
3 paperwork, expense, and expenditure of judicial and litigant resources in the many
4 instances in which no discovery dispute occurs. The proposed legislation would
5 thus make clear that if a party to an out-of-state case deposes a witness in this state
6 by properly issued notice or by agreement, the deponent or any party may seek
7 relief in a California court regardless of whether the deposing party obtained a
8 subpoena under Section 2029.010.⁶²

9 ***Review of Superior Court Decision in Discovery Dispute***

10 A further issue is how to obtain appellate review of a superior court decision
11 resolving a dispute relating to discovery for an out-of-state case. The proposed
12 legislation would permit a party or deponent aggrieved by a decision to seek an
13 extraordinary writ in the appropriate court of appeal.⁶³ Review by way of writ is
14 proper because the decision would be equivalent to a pretrial ruling on a discovery
15 issue, not a final judgment. The court of appeal is the appropriate tribunal because
16 the superior court proceeding would be treated like an unlimited civil case, due to
17 the potential complexity of the issues.⁶⁴

18 **Effect of the Proposed Reforms**

19 The procedure for obtaining discovery from a California resident for use in out-
20 of-state litigation should be clear and simple, while still protecting the interests of
21 the public generally and the deponent in particular. The clarifications proposed by
22 the Commission would help to achieve justice, prevent confusion, and make the
23 statute more workable for all concerned.

62. See proposed Section 2029.090 *infra*.

63. See proposed Section 2029.100 *infra*. The proposed provision is modeled on Code of Civil Procedure Sections 400 (writ of mandate to review order on motion to change place of trial) and 403.080 (writ of mandate to review order on reclassification motion).

64. See discussion of “Discovery Dispute” *supra*.

PROPOSED LEGISLATION

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1 **Code Civ. Proc. § 2029.010 (amended). Deposition in action pending outside California**

2 SEC. _____. Section 2029.010 of the Code of Civil Procedure is amended to
3 read:

4 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or
5 commission is issued out of any court of record in any other state, territory, or
6 district of the United States, or in a foreign nation, or whenever, on notice or
7 agreement, it is required to take the oral or written deposition, or a deposition for
8 the production of documents and things, of a ~~natural~~ person in California, the
9 deponent may be compelled to appear and testify, and to produce documents and
10 things, in the same manner, and by the same process as may be employed for the
11 purpose of taking testimony or producing documents and things in actions pending
12 in California.

13 **Comment.** Section 2029.010 is amended to apply to an organization located in California, not
14 just an individual found in the state. See Section 17 (“the word ‘person’ includes a corporation as
15 well as a natural person”); see also *Hassan v. Mercy American River Hospital*, 31 Cal. 4th 709,
16 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623 (2003) (whether “person” as used in particular section of
17 Code of Civil Procedure includes corporation or non-corporate entity “is ultimately a question of
18 legislative intent”); *Oil Workers Int’l Union v. Superior Court*, 103 Cal. App. 2d 512, 570-71,
19 230 P.2d 71 (1951) (unincorporated association is “person” for purpose of statutes in Code of
20 Civil Procedure governing contempt).

21 The section is also amended to make clear that it encompasses a deposition for the production
22 of documents and things, regardless of whether the deponent is required to testify.

23 **Code Civ. Proc. § 2029.020 (added). Application for subpoena**

24 SEC. _____. Section 2029.020 is added to the Code of Civil Procedure, to read:

25 2029.020. To obtain a subpoena or subpoena duces tecum under this chapter, the
26 party seeking a deposition shall file an application with the superior court of the
27 county in which the deposition is to be taken.

28 **Comment.** Section 2029.020 is added to clarify the procedure for obtaining a California
29 subpoena or subpoena duces tecum to depose a witness in this state for purposes of a proceeding

1 pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court
2 issuing it, the procedure is designed to be simple and expeditious.

3 See also Sections 2029.030 (issuance of subpoena by clerk of court), 2029.040 (issuance of
4 subpoena by local counsel), 2029.050 (Judicial Council forms), 2029.090 (deposition on notice or
5 agreement).

6 **Code Civ. Proc. § 2029.030 (added). Issuance of subpoena by clerk of court**

7 SEC. _____. Section 2029.030 is added to the Code of Civil Procedure, to read:

8 2029.030. (a) On receiving a properly completed application under Section
9 2029.020, and payment of the filing fee specified in Section 70626 of the
10 Government Code, the clerk of court shall issue the requested subpoena or
11 subpoena duces tecum.

12 (b) A subpoena or subpoena duces tecum issued under this section shall satisfy
13 both of the following conditions:

14 (1) It shall bear the caption and case number of the out-of-state case to which it
15 relates.

16 (2) It shall state the name of the court that issues it.

17 **Comment.** Section 2029.030 is added to clarify the procedure for obtaining a California
18 subpoena or subpoena duces tecum to depose a witness in this state for purposes of a proceeding
19 pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court
20 issuing it, the procedure is designed to be simple and expeditious.

21 See also Sections 2029.020 (application for subpoena), 2029.040 (issuance of subpoena by
22 local counsel), 2029.050 (Judicial Council forms), 2029.090 (deposition on notice or agreement).

23 **Code Civ. Proc. § 2029.040 (added). Issuance of subpoena by local counsel**

24 SEC. _____. Section 2029.040 is added to the Code of Civil Procedure, to read:

25 2029.040. (a) Notwithstanding Sections 1986 and 2029.020, if a party to a
26 proceeding pending in another jurisdiction retains an attorney licensed to practice
27 in this state, who is an active member of the State Bar, and the requirements of
28 Section 2029.010 are satisfied, that attorney may issue a subpoena or subpoena
29 duces tecum under this chapter.

30 (b) A subpoena or subpoena duces tecum issued under this section shall satisfy
31 both of the following conditions:

32 (1) It shall bear the caption and case number of the out-of-state case to which it
33 relates.

34 (2) It shall state the name of the superior court for the county in which the
35 deposition is to be taken.

36 **Comment.** Section 2029.040 is added to make clear that if certain conditions are satisfied,
37 local counsel may issue process compelling a California witness to appear at a deposition for an
38 action pending outside California. The section does not specify whether a party to out-of-state
39 litigation must retain local counsel to obtain a subpoena or subpoena duces tecum under this
40 chapter. For guidance on that point, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; see also
41 Report of the California Supreme Court Multijurisdictional Practice Implementation Committee:
42 Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task
43 Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In
44 general, a party to out-of-state litigation may take a deposition in California without retaining
45 local counsel if the party is self-represented or represented by an attorney duly admitted to

1 practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119,
2 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own
3 interests regardless of State Bar membership....”); Cal. R. Ct. 966; Final Report and
4 Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery
5 dispute arises in connection with such a deposition and a party to out-of-state litigation wants to
6 appear in a California court with respect to the dispute.

7 See also Sections 2029.020 (application for subpoena), 2029.030 (issuance of subpoena by
8 clerk of court), 2029.050 (Judicial Council forms), 2029.090 (deposition on notice or agreement).

9 **Code Civ. Proc. § 2029.050 (added). Judicial Council forms**

10 SEC. _____. Section 2029.050 is added to the Code of Civil Procedure, to read:

11 2029.050. On or before January 1, 2009, the Judicial Council shall do all of the
12 following:

13 (a) Prepare an application form to be used for purposes of Section 2029.020.
14 The application form shall require the applicant to attach a true and correct copy of
15 the mandate, writ, letters rogatory, letter of request, commission, or other
16 document authorizing the deposition. As soon as the application form becomes
17 available, every applicant shall use the form.

18 (b) Prepare one or more new subpoena forms that include instructions for use in
19 issuance of a subpoena under Section 2029.030 or 2029.040. Alternatively, the
20 Judicial Council may modify one or more existing subpoena forms to include
21 instructions for use in issuance of a subpoena under Section 2029.030 or
22 2029.040. As soon as a Judicial Council form becomes available, use of the form
23 is mandatory.

24 **Comment.** Section 2029.050 is new. The Judicial Council is to prepare forms to facilitate
25 compliance with this chapter.

26 **Note.** Section 2029.050 would set a deadline of January 1, 2009, for the Judicial Council to
27 prepare the required forms. This deadline is premised on enactment of the proposed legislation in
28 2007, with an effective date of January 1, 2008. That would give the Judicial Council one year to
29 prepare the forms. The deadline would have to be adjusted if the proposed legislation was not
30 introduced in the Legislature until 2008 or later.

31 **Code Civ. Proc. § 2029.060 (added). Procedure for resolving discovery dispute**

32 SEC. _____. Section 2029.060 is added to the Code of Civil Procedure, to read:

33 2029.060. (a) If a dispute arises relating to a deposition that a party is taking in
34 this state for purposes of a proceeding pending in another jurisdiction, the
35 deponent or a party to the proceeding may file a petition for a protective order or
36 to compel discovery or obtain other appropriate relief in the superior court of the
37 county in which the deposition is being taken.

38 (b) On filing a petition under subdivision (a), a petitioner who is a party to the
39 out-of-state proceeding shall pay a first appearance fee as specified in Section
40 70611 of the Government Code. A petitioner who is not a party to the out-of-state
41 proceeding shall pay a motion fee as specified in subdivision (a) of Section 70617
42 of the Government Code.

43 (c) The court in which the petition is filed shall assign it a case number.

(d) On responding to a petition under this section, a party to the out-of-state proceeding shall pay a first appearance fee as specified in Section 70612 of the Government Code. A person who is not a party to the out-of-state proceeding may file a response without paying a fee.

(e) Any petition, response, or other document filed under this section shall satisfy all of the following conditions:

(1) It shall bear the caption and case number of the out-of-state case to which it relates.

(2) The first page shall state the name of the court in which the document is filed.

(3) The first page shall state the case number assigned by the court under subdivision (c).

Comment. Section 2029.060 is added to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction. This section does not preclude a person involved in such a dispute from seeking relief in the out-of-state tribunal instead of in California. But other constraints may apply. For example, the out-of-state tribunal might lack personal jurisdiction over the deponent. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

A request for relief pursuant to this section is properly denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

See also Sections 2029.070 (subsequent discovery dispute in same case and county), 2029.080 (hearing date and briefing schedule), 2029.090 (deposition on notice and agreement), 2029.100 (writ petition).

Code Civ. Proc. § 2029.070 (added). Subsequent discovery dispute in same case and county

SEC. _____. Section 2029.070 is added to the Code of Civil Procedure, to read:

2029.070. (a) If a petition has been filed under Section 2029.060 and another dispute later arises relating to a deposition being taken in the same county for purposes of the same out-of-state proceeding, the deponent or a party to the proceeding may file a petition for appropriate relief in the same superior court as the first petition.

(b) The first page of the petition shall clearly indicate that it is not the first petition filed in that court that relates to the out-of-state case.

(c) If the petitioner in the new dispute is not a party to the out-of-state case, or is a party who previously paid a first appearance fee under this chapter, the petitioner shall pay a motion fee as specified in subdivision (a) of Section 70617 of the Government Code. If the petitioner in the new dispute is a party to the out-of-state case but has not previously paid a first appearance fee under this chapter, the petitioner shall pay a first appearance fee as specified in Section 70611 of the Government Code.

(d) If a person responding to the new petition is not a party to the out-of-state case, or is a party who previously paid a first appearance fee under this chapter, that person is not required to pay a fee for responding. If a person responding to the new petition is a party to the out-of-state case but has not previously paid a first appearance fee under this chapter, that person shall pay a first appearance fee as specified in Section 70612 of the Government Code.

(e) Any petition, response, or other document filed under this section shall satisfy all of the following conditions:

(1) It shall bear the caption and case number of the out-of-state case to which it relates.

(2) The first page shall state the name of the court in which the document is filed.

(3) The first page shall state the same case number that the court assigned to the first petition relating to the out-of-state case.

Comment. Section 2029.070 is added to clarify the procedure that applies when two or more discovery disputes relating to the same out-of-state proceeding arise in the same county. To promote efficiency and fairness and minimize inconsistent results, all documents relating to the same out-of-state case are to be filed together, bearing the same California case number.

Section 2029.070 does not apply when discovery disputes relate to the same out-of-state case but arise in different counties. In that situation, each petition for relief must be filed in the superior court of the county in which the deposition is being taken. See Section 2029.060(a). In appropriate circumstances, a petition may be transferred and consolidated with a petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation); see also Gov't Code § 70618 (transfer fees). In determining whether to order a transfer, a court should consider factors such as convenience of the deponent and similarity of issues.

See also Sections 2029.060 (procedure for resolving discovery dispute), 2029.080 (hearing date and briefing schedule), 2029.090 (deposition on notice and agreement), 2029.100 (writ petition).

Code Civ. Proc. § 2029.080 (added). Hearing date and briefing schedule

SEC. _____. Section 2029.080 is added to the Code of Civil Procedure, to read:

2029.080. A petition under Section 2029.060 or Section 2029.070 is subject to the requirements of Section 1005 relating to notice and to filing and service of papers.

Comment. Section 2029.080 is added to clarify the proper hearing date and briefing schedule for a petition under Section 2029.060 or 2029.070. The petition is to be treated in the same manner as a discovery motion in a case pending within the state.

Code Civ. Proc. § 2029.090 (added). Deposition on notice or agreement

SEC. _____. Section 2029.090 is added to the Code of Civil Procedure, to read:

2029.090. If a party to a proceeding pending in another jurisdiction seeks to depose a witness in this state by properly issued notice or by agreement, it is not necessary for that party to obtain a subpoena or subpoena duces tecum under this chapter to be able to seek relief under Section 2029.060 or 2029.070. The deponent or any other party may also seek relief under Section 2029.060 or 2029.070 in those circumstances, regardless of whether the deponent was subpoenaed under this chapter.

1 **Comment.** Section 2029.090 is added to clarify how this chapter applies when a party to a
2 proceeding pending in another jurisdiction seeks to depose a witness in this state by properly
3 issued notice or by agreement.

4 **Code Civ. Proc. § 2029.100 (added). Writ petition**

5 SEC. _____. Section 2029.100 is added to the Code of Civil Procedure, to read:

6 2029.100. (a) If a superior court issues an order granting or denying or otherwise
7 resolving a petition under Section 2029.060 or 2029.070, a party or deponent
8 aggrieved by the order may petition the appropriate court of appeal for an
9 extraordinary writ.

10 (b) Immediately after filing a writ petition in a court of appeal under this section,
11 the petitioner shall file a copy of it in the superior court that issued the challenged
12 order.

13 (c) Pending its decision on the writ petition, the court of appeal may stay the
14 order of the superior court, the deposition that is the subject of that order, or both.

15 (d) Immediately after the court of appeal decides the writ petition and its order
16 on the petition becomes final, the clerk of the court of appeal shall file a copy of
17 the final order with the clerk of the superior court.

18 **Comment.** Section 2029.100 is added to clarify the procedure for reviewing a decision of a
19 superior court on a dispute arising in connection with discovery under this chapter. The provision
20 is modeled on Sections 400 (writ of mandate to review order on motion to change place of trial)
21 and 403.080 (writ of mandate to review order on reclassification motion).

22 **Gov't Code § 70626 (amended). Miscellaneous filing fees**

23 SEC. _____. Section 70626 of the Government Code is amended to read:

24 70626. (a) The fee for each of the following services is fifteen dollars (\$15).
25 Amounts collected shall be distributed to the Trial Court Trust Fund under Section
26 68085.1.

27 (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of
28 sale, a writ of possession, a writ of prohibition, or any other writ for the
29 enforcement of any order or judgment.

30 (2) Issuing an abstract of judgment.

31 (3) Issuing a certificate of satisfaction of judgment under Section 724.100 of the
32 Code of Civil Procedure.

33 (4) Certifying a copy of any paper, record, or proceeding on file in the office of
34 the clerk of any court.

35 (5) Taking an affidavit, except in criminal cases or adoption proceedings.

36 (6) Acknowledgment of any deed or other instrument, including the certificate.

37 (7) Recording or registering any license or certificate, or issuing any certificate
38 in connection with a license, required by law, for which a charge is not otherwise
39 prescribed.

40 (8) Issuing any certificate for which the fee is not otherwise fixed.

41 (b) The fee for each of the following services is twenty dollars (\$20). Amounts
42 collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.

- 1 (1) Issuing an order of sale.
- 2 (2) Receiving and filing an abstract of judgment rendered by a judge of another
- 3 court and subsequent services based on it, unless the abstract of judgment is filed
- 4 under Section 704.750 or 708.160 of the Code of Civil Procedure.
- 5 (3) Filing a confession of judgment under Section 1134 of the Code of Civil
- 6 Procedure.
- 7 (4) Filing an application for renewal of judgment under Section 683.150 of the
- 8 Code of Civil Procedure.
- 9 (5) Issuing a commission to take a deposition in another state or place under
- 10 Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under
- 11 Section 2029.030 to take a deposition in this state for purposes of a proceeding
- 12 pending in another jurisdiction.
- 13 (6) Filing and entering an award under the Workers' Compensation Law
- 14 (Division 4 (commencing with Section 3200) of the Labor Code).
- 15 (7) Filing an affidavit of publication of notice of dissolution of partnership.
- 16 (8) Filing an appeal of a determination whether a dog is potentially dangerous or
- 17 vicious under Section 31622 of the Food and Agricultural Code.
- 18 (9) Filing an affidavit under Section 13200 of the Probate Code, together with
- 19 the issuance of one certified copy of the affidavit under Section 13202 of the
- 20 Probate Code.
- 21 (10) Filing and indexing all papers for which a charge is not elsewhere provided,
- 22 other than papers filed in actions or special proceedings, official bonds, or
- 23 certificates of appointment.
- 24 **Comment.** Subdivision (b) of Section 70626 is amended to specify the fee for obtaining a
- 25 subpoena from a California court to take a deposition in this state for purposes of a proceeding
- 26 pending in another jurisdiction. If a person seeks multiple subpoenas, a separate fee is payable
- 27 under this subdivision for each subpoena sought.

D R A F T

FOR DISCUSSION ONLY

INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-FIFTEENTH YEAR
HILTON HEAD, SOUTH CAROLINA
JULY 7-14, 2006

INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

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INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

Prefatory Note

1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

[A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation “due to its being obsolete.” Until now, no other uniform act for interstate depositions has been proposed.

2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform. These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the “courts” or “judicial proceedings” of the other state. Some states allow depositions for any “proceeding.” The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term “party” without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any “interested party” to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the “testimony” of witnesses. The UIIPA expressly applies to “testimony or documents or other things.” Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness “to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises...”

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial court and then serve the witness with a subpoena under the law of the trial court. If a motion to compel is necessary, it must be filed in the witness’s home court. Other states require that a notice of deposition be shown to a clerk or judge in the deponent’s home court, after which

a subpoena will automatically issue. Still other states require a letter rogatory requesting the trial court to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the witness's jurisdiction to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness "may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." The UIIPA provides that methods of service includes service "in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction." State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the home state power to issue, refuse to issue, or quash a subpoena.

g. Where can the witness be deposed?

Some states limit the place where a deposition can be taken to the witness's jurisdiction, and some limit it to the witness's home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the witness's home jurisdiction apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction's discovery procedure applies?

A significant issue is whether the trial state's or discovery state's discovery procedure controls, and on what issues. The general Restatement rule is that the forum state's (the discovery state's) procedure applies. The UIIPA, as well as many states, provides that the discovery state (the deponent's home court) can either use the procedure of the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state's or discovery state's courts can issue protective orders. Both states have interests: the trial state's courts have an interest in protecting witnesses from improper practices, and the discovery state's courts have an obvious interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most

states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state court should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency. The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states.

1 **INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT**

2

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Interstate Depositions and

4 Discovery of Documents Act.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Foreign jurisdiction” means the District of Columbia, Puerto Rico, the United States

7 Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States,

8 or any of the United States other than this state.

9 (2) “Person” means an individual, corporation, business trust, estate, trust, partnership,

10 limited liability company, association, joint venture, public corporation, government or

11 governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

12 (3) “Subpoena” means a court order regardless of title requiring a person to:

13 (A) attend and give testimony at a deposition;

14 (B) produce and permit inspection and copying of designated books, documents,

15 or tangible things in the possession, custody, or control of the person; or

16 (C) permit inspection of premises under the control of the person.

17 **Comment**

18

19 This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the

20 Virgin Islands, and the territories of the United States. The committee decided not to extend this

21 Act to include foreign countries including the Canadian provinces. The committee felt that

22 international litigation is sufficiently different and is governed by different principles, so that

23 discovery issues in that arena should be governed by a separate act.

24

25 The term “Subpoena” includes a subpoena duces tecum. The description of a subpoena

26 in the Act is based on the language of Rule 45 of the FRCP.

27

SECTION 3. ISSUING A SUBPOENA. (7/12/06 version)

(a) A party may present a subpoena issued from a court of record of a foreign jurisdiction to the clerk of court in the [county or district] in which discovery is sought to be conducted in this state.

(b) When a party presents a subpoena issued from a court of record of a foreign jurisdiction to the clerk of court in this state, the clerk shall immediately issue a subpoena to the person to whom the subpoena is directed and incorporate the terms used in the foreign jurisdiction subpoena.

Comment

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee felt that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the foreign jurisdiction, so that a subpoena is then issued in the name of the foreign jurisdiction, is the necessary act that invokes the jurisdiction of the foreign jurisdiction, which in turn makes the newly issued subpoena both enforceable and challengeable in the foreign jurisdiction.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas where the witness to be deposed lives in Ohio: A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Ohio county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare an Ohio subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Ohio, who will take the completed and executed Kansas subpoena and the completed but not yet executed Ohio subpoena to the clerk's office in Ohio. The clerk of court, upon being given the Kansas subpoena, will then issue the identical Ohio subpoena ("issue" includes signing, stamping, and assigning a docket number). The process server will pay any necessary filing fees, and then serve the Ohio subpoena (with a list of all parties and counsel of record) on the deponent in accordance with Ohio law.

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

SECTION 4. SERVING A SUBPOENA. (7/12/06 version) A party seeking to serve a subpoena issued by a clerk of court under Section 3 must serve the subpoena in compliance with [cite rule or statute of this state for service of subpoena]. The subpoena must be accompanied by a list of all parties and the names, addresses, and telephone numbers of all counsel of record.

Comment

The Act requires that, when the subpoena is served, it be accompanied by a list of all parties and the names, addresses, and telephone numbers of all counsel of record. The committee felt that this requirement imposes no burden on the lawyer issuing the subpoena, since that lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of all the parties to the action and to contact the other lawyers in the case.

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION. (7/12/06 version)

If a subpoena issued under Section 3 commands the person to:

(1) attend and give testimony at a deposition, the time and place for and the manner of taking the deposition must comply with [cite rule or statute of this state governing the time and place for and the manner of taking depositions];

(2) produce designated books, documents, or tangible objects, the production must comply with [cite rule or statute of this state governing the production of designated books, documents, and tangible objects]; or

(3) permit inspection of premises, the inspection must comply with [cite rule or statute of this state governing the inspection of premises].

Comment

The Act requires that a deposition, production of records, and inspection of premises must comply with the laws of the discovery state. Since the discovery state's primary interest in these cases is to protect its residents who become non-party witnesses in an action pending in another jurisdiction from any unreasonable or unduly burdensome discovery request, this is easily accomplished by requiring that the discovery procedure be the same as it would be if the case had originally been filed in the discovery state.

SECTION 6. MOTIONS. Any motion to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the laws of this state and be presented in the court in the [county or district] in which discovery is to be conducted.

Comment

The act requires that any motion to enforce, quash, or modify a subpoena, or any motion to compel testimony, must comply with the procedural and evidentiary law of the discovery state. Again, the discovery state's primary goal is to protect its residents who become non-party witnesses in an action pending in another jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state.


The committee chose not to address particular evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege. As the preface notes, such issues are particularly thorny, and are best decided under the laws of the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.


SECTION 8. EFFECTIVE DATE. This [act] takes effect _____.

DRAFT LEGISLATION COMBINING NCCUSL AND CLRC PROPOSALS (10/3/06)

 **Note.** In the following table of contents, provisions that consist partially or entirely of NCCUSL language are shown in gray.

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1  **Note.** In the following draft, NCCUSL's language is shown in gray.

2 **Heading of Article 1 (commencing with Section 2029.010) (added)**

3 SECTION 1. The heading of Article 1 (commencing with Section 2029.010) of
4 Chapter 12 of Title 4 of Part 4 is added to the Code of Civil Procedure, to read:

5 Article 1. Deposition in Action Pending in Foreign Nation

6 **Comment.** The heading “Article 1. Deposition in Action Pending in Foreign Nation” is added
7 to reflect the newly narrowed scope of Section 2029.010 (deposition in action pending in foreign
8 nation) and the addition of the Interstate Depositions and Discovery Act (Sections 2029.100-
9 2029.800).

10 **Code Civ. Proc. § 2029.010 (amended). Deposition in action pending in foreign nation**

11 SEC. 2. Section 2029.010 of the Code of Civil Procedure is amended to read:

12 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or
13 commission is issued out of any court of record ~~in any other state, territory, or~~
14 ~~district of the United States, or~~ in a foreign nation, or whenever, on notice or

1 agreement, it is required to take the oral or written deposition of a natural person
2 in California, the deponent may be compelled to appear and testify, and to produce
3 documents and things, in the same manner, and by the same process as may be
4 employed for the purpose of taking testimony in actions pending in California.

5 **Comment.** Section 2029.010 is amended to apply only to a deposition in an action pending in a
6 foreign nation. Formerly, the provision also applied to a deposition in an action pending in
7 another jurisdiction of the United States. For the rules now applicable to such a deposition, see
8 the Interstate Depositions and Discovery Act (Sections 2029.100-2029.800).

9 **Code Civ. Proc. §§ 2029.100-2029.800 (added). Interstate Depositions and Discovery Act**

10 SEC. 3. Article 2 (commencing with Section 2029.100) is added to Chapter 12
11 of Title 4 of Part 4 of the Code of Civil Procedure, to read:

12 Article 2. Interstate Depositions and Discovery Act

13 **Code Civ. Proc. § 2029.100. Short title**

14 2029.100. This act may be cited as the Interstate Depositions and Discovery Act.

15 **Comment.** Section 2029.100 is the same as Section 1 of the Uniform Interstate Depositions
16 and Discovery Act (as of September 2006), which is under consideration by the National
17 Conference of Commissioners on Uniform State Laws.

18 **Code Civ. Proc. § 2029.200. Definitions**

19 2029.200. In this act:

20 (a) “Foreign jurisdiction” means the District of Columbia, Puerto Rico, the
21 United States Virgin Islands, any territory or insular possession subject to the
22 jurisdiction of the United States, or any of the United States other than this state.

23 (b) “Person” means an individual, corporation, business trust, estate, trust,
24 partnership, limited liability company, association, joint venture, public
25 corporation, government or governmental subdivision, agency or instrumentality,
26 or any other legal or commercial entity.

27 (c) “Subpoena” means a court order regardless of title requiring a person to do
28 any of the following:

29 (1) Attend and give testimony at a deposition;

30 (2) Produce and permit inspection and copying of designated books, documents,
31 or tangible things in the possession, custody, or control of the person; or

32 (3) Permit inspection of premises under the control of the person.

33 **Comment.** Section 2029.200 is the same as Section 2 of the Uniform Interstate Depositions
34 and Discovery Act (as of July 12, 2006), which is under consideration by the National
35 Conference of Commissioners on Uniform State Laws.

36 Subdivision (a) limits the scope of this article; the rules apply only to discovery in an action
37 pending in a jurisdiction of the United States. For discovery in an action pending in a foreign
38 nation, see Section 2029.010.

39 Subdivision (b) defines “person” broadly. This is consistent with the general code-wide
40 definition in Section 17 (“the word ‘person’ includes a corporation as well as a natural person”).
41 For guidance on interpreting other provisions of this code referring to a “person,” see *Hassan v.*

1 Mercy American River Hospital, 31 Cal. 4th 709, 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623
2 (2003) (whether “person” as used in particular section of Code of Civil Procedure includes
3 corporation or non-corporate entity “is ultimately a question of legislative intent”); Diamond
4 View Limited v. Herz, 180 Cal. App. 3d 612, 616-19, 225 Cal. Rptr. 651 (1986) (“[T]he
5 preliminary definition contained in section 17 is superseded when it obviously conflicts with the
6 Legislature’s subsequent use of the term in a different statute.”); Oil Workers Int’l Union v.
7 Superior Court, 103 Cal. App. 2d 512, 570-71, 230 P.2d 71 (1951) (unincorporated association is
8 “person” for purpose of statutes in Code of Civil Procedure governing contempt).

9 Subdivision (c) defines “subpoena” broadly. The term includes, without limitation, a mandate,
10 writ, letters rogatory, letter of request, or commission requiring a person to testify at a deposition,
11 produce documents or other items, or permit inspection of property.

12 **Code Civ. Proc. § 2029.300. Issuance of subpoena by clerk of court**

13 2029.300. (a) To obtain a subpoena under this article, a party seeking discovery
14 for a proceeding pending in a foreign jurisdiction shall do all of the following, in
15 the superior court of the county in which the discovery is to be conducted:

16 (1) File the original or a true and correct copy of a subpoena issued by a court of
17 record of a foreign jurisdiction.

18 (2) File an application requesting that the superior court issue a subpoena with
19 the same terms as the subpoena issued by a court of record of a foreign
20 jurisdiction.

21 (3) Pay the filing fee specified in Section 70626 of the Government Code.

22 (b) When a party files a subpoena issued from a court of record of a foreign
23 jurisdiction with the clerk of court under subdivision (a) and satisfies the other
24 requirements of subdivision (a), the clerk of court shall immediately issue a
25 subpoena as requested and incorporate the terms used in the foreign jurisdiction
26 subpoena.

27 (c) A subpoena issued under this section shall satisfy both of the following
28 conditions:

29 (1) It shall bear the caption and case number of the out-of-state case to which it
30 relates.

31 (2) It shall state the name of the court that issues it.

32 **Comment.** Section 2029.300 is similar to Section 3 of the Uniform Interstate Depositions and
33 Discovery Act (as of July 12, 2006), which is under consideration by the National Conference of
34 Commissioners on Uniform State Laws. The provision is added to clarify the procedure for
35 obtaining a California subpoena to obtain discovery from a witness in this state for use in a
36 proceeding pending in another United States jurisdiction. For the benefit of the party seeking the
37 subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

38 See also Sections 2029.010 (deposition in action pending in foreign nation), 2029.350
39 (issuance of subpoena by local counsel), 2029.390 (Judicial Council forms), 2029.640 (deposition
40 on notice or agreement).

41 **Code Civ. Proc. § 2029.350. Issuance of subpoena by local counsel**

42 2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a
43 proceeding pending in a foreign jurisdiction retains an attorney licensed to practice
44 in this state, who is an active member of the State Bar, and that attorney receives
45 the original or a true and correct copy of a subpoena issued by a court of record of

1 a foreign jurisdiction, the attorney may issue a subpoena under this article,
2 incorporating the terms used in the foreign jurisdiction subpoena.

3 (b) A subpoena issued under this section shall satisfy both of the following
4 conditions:

5 (1) It shall bear the caption and case number of the out-of-state case to which it
6 relates.

7 (2) It shall state the name of the superior court of the county in which the
8 discovery is to be conducted.

9 **Comment.** Section 2029.350 is added to make clear that if certain conditions are satisfied,
10 local counsel may issue process compelling a California witness to appear at a deposition for an
11 action pending in another United States jurisdiction. The section does not specify whether a party
12 to out-of-state litigation must retain local counsel to obtain a subpoena under this article. For
13 guidance on that point, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; see also Report of the
14 California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report
15 and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on
16 Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a
17 party to out-of-state litigation may take a deposition in California without retaining local counsel
18 if the party is self-represented or represented by an attorney duly admitted to practice in another
19 jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr.
20 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests
21 regardless of State Bar membership....”); Cal. R. Ct. 966; Final Report and Recommendations,
22 *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in
23 connection with such a deposition and a party to out-of-state litigation wants to appear in a
24 California court with respect to the dispute.

25 See also Sections 2029.010 (deposition in action pending in foreign nation), 2029.300
26 (issuance of subpoena by clerk of court), 2029.390 (Judicial Council forms), 2029.640
27 (deposition on notice or agreement).

28 **Code Civ. Proc. § 2029.390. Judicial Council forms**

29 2029.390. On or before January 1, 2009, the Judicial Council shall do all of the
30 following:

31 (a) Prepare an application form to be used for purposes of Section 2029.300. As
32 soon as the application form becomes available, every applicant shall use the form.

33 (b) Prepare one or more new subpoena forms that include clear instructions for
34 use in issuance of a subpoena under Section 2029.300 or 2029.350. Alternatively,
35 the Judicial Council may modify one or more existing subpoena forms to include
36 clear instructions for use in issuance of a subpoena under Section 2029.300 or
37 2029.350. As soon as a Judicial Council form becomes available, use of the form
38 is mandatory.

39 **Comment.** Section 2029.390 is new. The Judicial Council is to prepare forms to facilitate
40 compliance with this article.

41 **Note.** Section 2029.390 would set a deadline of January 1, 2009, for the Judicial Council to
42 prepare the required forms. This deadline is premised on enactment of the proposed legislation in
43 2007, with an effective date of January 1, 2008. That would give the Judicial Council one year to
44 prepare the forms. The deadline would have to be adjusted if the proposed legislation was not
45 introduced in the Legislature until 2008 or later.

1 **Code Civ. Proc. § 2029.400. Service of subpoena**

2 2029.400. A party seeking to serve a subpoena issued under this article must
3 serve the subpoena in compliance with the law of this state, including, without
4 limitation, Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2. The
5 subpoena must be accompanied by a list of all parties and the names, addresses,
6 and telephone numbers of all counsel of record.

7 **Comment.** With references to California law inserted as contemplated, Section 2029.400 is the
8 same as Section 4 of the Uniform Interstate Depositions and Discovery Act (as of July 12, 2006),
9 which is under consideration by the National Conference of Commissioners on Uniform State
10 Laws.

11 **Code Civ. Proc. § 2029.500. Deposition, production, and inspection**

12 2029.500. If a subpoena issued under this article commands the person to:

13 (a) Attend and give testimony at a deposition, the time and place for and the
14 manner of taking the deposition must comply with the law of this state, including,
15 without limitation, Title 4 (commencing with Section 2016.010) of Part 4.

16 (b) Produce designated books, documents, or tangible objects, the production
17 must comply with the law of this state, including, without limitation, Title 4
18 (commencing with Section 2016.010) of Part 4.

19 (c) Permit inspection of premises, the inspection must comply with the law of
20 this state, including, without limitation, Title 4 (commencing with Section
21 2016.010) of Part 4.

22 **Comment.** With references to California law inserted as contemplated, Section 2029.500 is the
23 same as Section 5 of the Uniform Interstate Depositions and Discovery Act (as of July 12, 2006),
24 which is under consideration by the National Conference of Commissioners on Uniform State
25 Laws.

26 **Code Civ. Proc. § 2029.600. Law applicable to discovery dispute**

27 2029.600. Any dispute relating to discovery under this article must be resolved
28 in compliance with the law of this state. If the dispute is to be resolved by the
29 courts of this state, it must be presented in the superior court in the county in
30 which the discovery is to be conducted.

31 **Comment.** Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and
32 Discovery Act (as of July 12, 2006), which is under consideration by the National Conference of
33 Commissioners on Uniform State Laws.

34 See also Sections 2029.610 (procedure for resolving discovery dispute), 2029.620 (subsequent
35 discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule),
36 2029.640 (deposition on notice or agreement), 2029.650 (writ petition).

37 **Code Civ. Proc. § 2029.610. Procedure for resolving discovery dispute**

38 2029.610. (a) If a dispute arises relating to discovery that a party is conducting
39 in this state for purposes of a proceeding pending in a foreign jurisdiction, the
40 deponent or a party to the proceeding may file a petition for a protective order or
41 to compel discovery or obtain other appropriate relief in the superior court of the
42 county in which the discovery is being conducted.

1 (b) On filing a petition under subdivision (a), a petitioner who is a party to the
2 out-of-state proceeding shall pay a first appearance fee as specified in Section
3 70611 of the Government Code. A petitioner who is not a party to the out-of-state
4 proceeding shall pay a motion fee as specified in subdivision (a) of Section 70617
5 of the Government Code.

6 (c) The court in which the petition is filed shall assign it a case number.

7 (d) On responding to a petition under this section, a party to the out-of-state
8 proceeding shall pay a first appearance fee as specified in Section 70612 of the
9 Government Code. A person who is not a party to the out-of-state proceeding may
10 file a response without paying a fee.

11 (e) Any petition, response, or other document filed under this section shall
12 satisfy all of the following conditions:

13 (1) It shall bear the caption and case number of the out-of-state case to which it
14 relates.

15 (2) The first page shall state the name of the court in which the document is
16 filed.

17 (3) The first page shall state the case number assigned by the court under
18 subdivision (c).

19 **Comment.** Section 2029.610 is added to clarify the procedure for using a California court to
20 resolve a dispute relating to discovery conducted in this state for purposes of a proceeding
21 pending in another United States jurisdiction. This section does not preclude a person involved in
22 such a dispute from seeking relief in the out-of-state tribunal instead of in California. But other
23 constraints may apply. For example, the out-of-state tribunal might lack personal jurisdiction over
24 the deponent. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980);
25 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

26 A request for relief pursuant to this section is properly denominated a “petition,” not a
27 “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records
28 of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written
29 objection to production as authorized by the statute. To obtain production, the subpoenaing party
30 would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g)
31 prescribes for a case pending in California.

32 See also Sections 2029.600 (law applicable to discovery dispute), 2029.620 (subsequent
33 discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule),
34 2029.640 (deposition on notice and agreement), 2029.650 (writ petition).

35 **Code Civ. Proc. § 2029.620. Subsequent discovery dispute in same case and county**

36 2029.620. (a) If a petition has been filed under Section 2029.610 and another
37 dispute later arises relating to discovery being conducted in the same county for
38 purposes of the same out-of-state proceeding, the deponent or a party to the
39 proceeding may file a petition for appropriate relief in the same superior court as
40 the first petition.

41 (b) The first page of the petition shall clearly indicate that it is not the first
42 petition filed in that court that relates to the out-of-state case.

43 (c) If the petitioner in the new dispute is not a party to the out-of-state case, or is
44 a party who previously paid a first appearance fee under this article, the petitioner
45 shall pay a motion fee as specified in subdivision (a) of Section 70617 of the

1 Government Code. If the petitioner in the new dispute is a party to the out-of-state
2 case but has not previously paid a first appearance fee under this article, the
3 petitioner shall pay a first appearance fee as specified in Section 70611 of the
4 Government Code.

5 (d) If a person responding to the new petition is not a party to the out-of-state
6 case, or is a party who previously paid a first appearance fee under this article, that
7 person does not have to pay a fee for responding. If a person responding to the
8 new petition is a party to the out-of-state case but has not previously paid a first
9 appearance fee under this article, that person shall pay a first appearance fee as
10 specified in Section 70612 of the Government Code.

11 (e) Any petition, response, or other document filed under this section shall
12 satisfy all of the following conditions:

13 (1) It shall bear the caption and case number of the out-of-state case to which it
14 relates.

15 (2) The first page shall state the name of the court in which the document is
16 filed.

17 (3) The first page shall state the same case number that the court assigned to the
18 first petition relating to the out-of-state case.

19 **Comment.** Section 2029.620 is added to clarify the procedure that applies when two or more
20 discovery disputes relating to the same out-of-state proceeding arise in the same county. To
21 promote efficiency and fairness and minimize inconsistent results, all documents relating to the
22 same out-of-state case are to be filed together, bearing the same California case number.

23 Section 2029.620 does not apply when discovery disputes relate to the same out-of-state case
24 but arise in different counties. In that situation, each petition for relief must be filed in the
25 superior court of the county in which the deposition is being taken. See Sections 2029.600,
26 2029.610(a). In appropriate circumstances, a petition may be transferred and consolidated with a
27 petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation); see also
28 Gov't Code § 70618 (transfer fees). In determining whether to order a transfer, a court should
29 consider factors such as convenience of the deponent and similarity of issues.

30 See also Sections 2029.600 (law applicable to discovery dispute), 2029.610 (procedure for
31 resolving discovery dispute), 2029.630 (hearing date and briefing schedule), 2029.640 (deposition
32 on notice and agreement), 2029.650 (writ petition).

33 **Code Civ. Proc. § 2029.630. Hearing date and briefing schedule**

34 2029.630. A petition under Section 2029.610 or Section 2029.620 is subject to
35 the requirements of Section 1005 relating to notice and to filing and service of
36 papers.

37 **Comment.** Section 2029.630 is added to clarify the proper hearing date and briefing schedule
38 for a petition under Section 2029.610 or 2029.620. The petition is to be treated in the same
39 manner as a discovery motion in a case pending within the state.

40 **Code Civ. Proc. § 2029.640. Deposition on notice or agreement**

41 2029.640. If a party to a proceeding pending in a foreign jurisdiction seeks
42 discovery from a witness in this state by properly issued notice or by agreement, it
43 is not necessary for that party to obtain a subpoena under this article to be able to
44 seek relief under Section 2029.610 or 2029.620. The deponent or any other party

1 may also seek relief under Section 2029.610 or 2029.620 in those circumstances,
2 regardless of whether the deponent was subpoenaed under this chapter.

3 **Comment.** Section 2029.640 is added to clarify how this article applies when a party to a
4 proceeding pending in another United States jurisdiction seeks discovery from a witness in this
5 state by properly issued notice or by agreement.

6 **Code Civ. Proc. § 2029.650. Writ petition**

7 2029.650. (a) If a superior court issues an order granting or denying or otherwise
8 resolving a petition under Section 2029.610 or 2029.620, a party or deponent
9 aggrieved by the order may petition the appropriate court of appeal for an
10 extraordinary writ.

11 (b) Immediately after filing a writ petition in a court of appeal under this section,
12 the petitioner shall file a copy of it in the superior court that issued the challenged
13 order.

14 (c) Pending its decision on the writ petition, the court of appeal may stay the
15 order of the superior court, the discovery that is the subject of that order, or both.

16 (d) Immediately after the court of appeal decides the writ petition and its order
17 on the petition becomes final, the clerk of the court of appeal shall file a copy of
18 the final order with the clerk of the superior court.

19 **Comment.** Section 2029.650 is added to clarify the procedure for reviewing a decision of a
20 superior court on a dispute arising in connection with discovery under this article. The provision
21 is modeled on Sections 400 (writ of mandate to review order on motion to change place of trial)
22 and 403.080 (writ of mandate to review order on reclassification motion).

23 **Code Civ. Proc. § 2029.700. Uniformity of application and construction**

24 2029.700. (a) Sections 2029.100, 2029.200, 2029.300(b), 2029.400, 2029.500,
25 2029.600, 2029.800, and this section, collectively, constitute and may be referred
26 to as the “Uniform Interstate Depositions and Discovery Act.”

27 (b) In applying and construing this uniform act, consideration must be given to
28 the need to promote uniformity of the law with respect to its subject matter among
29 the states that enact it.

30 **Comment.** Section 2029.700 is similar to Section 7 of the Uniform Interstate Depositions and
31 Discovery Act (as of July 12, 2006), which is under consideration by the National Conference of
32 Commissioners on Uniform State Laws.

33 **Code Civ. Proc. § 2029.800. Effective date**

34 2029.800. This act takes effect on January 1, 2008.

35 **Comment.** Section 2029.800 is the same as Section 8 of the Uniform Interstate Depositions
36 and Discovery Act (as of July 12, 2006), which is under consideration by the National
37 Conference of Commissioners on Uniform State Laws.

38 **Gov’t Code § 70626 (amended). Miscellaneous filing fees**

39 SEC. 4. Section 70626 of the Government Code is amended to read:

1 70626. (a) The fee for each of the following services is fifteen dollars (\$15).
2 Amounts collected shall be distributed to the Trial Court Trust Fund under Section
3 68085.1.

4 (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of
5 sale, a writ of possession, a writ of prohibition, or any other writ for the
6 enforcement of any order or judgment.

7 (2) Issuing an abstract of judgment.

8 (3) Issuing a certificate of satisfaction of judgment under Section 724.100 of the
9 Code of Civil Procedure.

10 (4) Certifying a copy of any paper, record, or proceeding on file in the office of
11 the clerk of any court.

12 (5) Taking an affidavit, except in criminal cases or adoption proceedings.

13 (6) Acknowledgment of any deed or other instrument, including the certificate.

14 (7) Recording or registering any license or certificate, or issuing any certificate
15 in connection with a license, required by law, for which a charge is not otherwise
16 prescribed.

17 (8) Issuing any certificate for which the fee is not otherwise fixed.

18 (b) The fee for each of the following services is twenty dollars (\$20). Amounts
19 collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.

20 (1) Issuing an order of sale.

21 (2) Receiving and filing an abstract of judgment rendered by a judge of another
22 court and subsequent services based on it, unless the abstract of judgment is filed
23 under Section 704.750 or 708.160 of the Code of Civil Procedure.

24 (3) Filing a confession of judgment under Section 1134 of the Code of Civil
25 Procedure.

26 (4) Filing an application for renewal of judgment under Section 683.150 of the
27 Code of Civil Procedure.

28 (5) Issuing a commission to take a deposition in another state or place under
29 Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under
30 Section 2029.300 to take a deposition in this state for purposes of a proceeding
31 pending in another jurisdiction.

32 (6) Filing and entering an award under the Workers' Compensation Law
33 (Division 4 (commencing with Section 3200) of the Labor Code).

34 (7) Filing an affidavit of publication of notice of dissolution of partnership.

35 (8) Filing an appeal of a determination whether a dog is potentially dangerous or
36 vicious under Section 31622 of the Food and Agricultural Code.

37 (9) Filing an affidavit under Section 13200 of the Probate Code, together with
38 the issuance of one certified copy of the affidavit under Section 13202 of the
39 Probate Code.

40 (10) Filing and indexing all papers for which a charge is not elsewhere provided,
41 other than papers filed in actions or special proceedings, official bonds, or
42 certificates of appointment.

1 **Comment.** Subdivision (b) of Section 70626 is amended to specify the fee for obtaining a
2 subpoena from a California court to take a deposition in this state for purposes of a proceeding
3 pending in another jurisdiction. If a person seeks multiple subpoenas, a separate fee is payable
4 under this subdivision for each subpoena sought.